No. 86-1027

Supreme Court, U.S.
FILED
DEC 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

SUN-LAND NURSERIES, INC., a California corporation,
Petitioner,

VS.

SOUTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS; AFFILIATED LABORERS LOCAL UNION 300; AFFILIATED LABORERS LOCAL UNION 652; and AFFILIATED LABORERS LOCAL UNION 1082,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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December 16, 1986

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QUESTIONS PRESENTED

1. Whether a "union specific" subcontracting clause contained in a collective bargaining agreement is invariably legalized by the construction industry proviso to section 8(e) of the National Labor Relations Act, as amended [29 U.S.C. § 158(e)], notwithstanding the unavailability of any of the safeguards provided by the Act to limit the top-down organizing effect of such subcontracting restrictions and the impairment of employees' paramount rights under section 7 of the National Labor Relations Act [29 U.S.C. § 157] to bargain collectively through representatives of their own choosing?

2. Whether a union specific subcontracting clause contained in a collective bargaining agreement and, therefore, arguably within the construction industry proviso to section 8(e) of the National Labor Relations Act, may serve as the basis of an antitrust claim under the Sherman Act [15 U.S.C. § 1, *et seq.*]?

3. Whether the *en banc* Court of Appeals erred by affirming the district court's judgment based upon an entirely different rationale than was expressly relied on by the district court or litigated by the parties, and without affording the parties any opportunity to address the sufficiency of the pleadings based upon the new antitrust standard announced by the *en banc* Court?

RULE 28.1 STATEMENT

Petitioner, Sun-Land Nurseries, Inc., has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

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SOUTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS; AFFILIATED LABORERS LOCAL UNION 300; AFFILIATED LABORERS LOCAL UNION 652; and AFFILIATED LABORERS LOCAL UNION 1082,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Sun-Land Nurseries, Inc. ("Sun-Land"), respectfully prays that a Writ of Certiorari issue to review the *en banc* opinion and judgment of the United States Court of Appeals for the Ninth Circuit, rendered in this proceeding on September 17, 1986.

OPINIONS BELOW

The opinion and judgment of the limited *en banc* panel of the Court of Appeals for the Ninth Circuit is officially reported at 793 F.2d 1110 (9th Cir. 1986) and appears as Appendix A.

The Order of the Court of Appeals for the Ninth Circuit granting rehearing *en banc* and withdrawing the prior judgment and opinion of the Court of Appeals is officially reported at 779 F.2d 1146 (9th Cir. 1986), and appears as Appendix B.

The prior judgment and opinion of the Court of Appeals for the Ninth Circuit is officially reported at 769 F.2d 1391 (9th Cir. 1985), and appears as Appendix C.

The Second Amended Memorandum of Decision and Order of the United States District Court for the Central District of California, which was reviewed by the Court of Appeals for the Ninth Circuit, is unreported and appears as Appendix D.

JURISDICTION

The judgment and opinion of the limited *en banc* panel of the Court of Appeals for the Ninth Circuit was entered on July 8, 1986. On July 24, 1986, Petitioner filed a timely Petition For Rehearing By The Full Court pursuant to Rule 25 of the Rules of the United States Court of Appeals for the Ninth Circuit. The Petition For Rehearing By The Full Court was denied by the Court of Appeals for the Ninth Circuit in an Order dated September 17, 1986, which appears as Appendix E.

Jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS

The relevant provisions of the National Labor Relations Act, as amended [29 U.S.C. § 151 *et seq.*] and the Sherman Act [15 U.S.C. § 1 *et seq.*] are set forth in Appendix F.

STATEMENT OF THE CASE

Statement of Facts

Sun-Land is a landscape contractor which subcontracts with general contractors, builders and developers on commercial and industrial construction projects throughout Southern California. Up until June of 1981, Sun-Land was signatory to a collective-bargaining agreement with Teamsters Local 420 which covered all of Sun-Land's landscaping operations and was not due to expire until June of 1983. However, in June of 1981, Sun-Land was informed by Teamsters Local 420 that it had disclaimed interest in representing the employees covered by said collective bargaining agreement.[1]

Following the disclaimer of interest by Teamsters Local 420, the disenfranchised landscape employees of Sun-Land decided to form a new union unaffiliated with Respondents, the Carpenters, Cement Masons, Operating Engineers or Teamsters Unions, or recognized by the Building and Construction Trades Council. On December 30, 1981, the National Labor Relations Board ("Board") certified the Independent Union of Craftsmen ("IUC") as the exclusive bargaining representative of the landscape

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[1]Sun-Land brought suit against Teamsters Local 420 in the United States District Court for the Central District of California for breach of collective bargaining agreement. The district court's entry of judgment in favor of Teamsters Local 420 was reversed by the United States Court of Appeals for the Ninth Circuit in *Toyota Landscape Company, Inc., et al. v. Building Material & Dump Truck Drivers, Local No. 420, etc.*, 726 F.2d 525 (9th Cir. 1984), *cert. denied*, 105 S.Ct. 104 (1984).

employees of Sun-Land.[2] In May of 1983, Sun-Land entered into a collective bargaining agreement with the IUC.

Since 1980, Respondents have been signatory to collective bargaining agreements with various multi-employer associations and other employers[3] containing the following restriction upon the subcontracting of work covered by said collective bargaining agreements by members of the various multi-employer associations and other signatory employers:

> "The Contractor agrees . . . that neither the Contractor nor any Subcontractor on the jobsite will subcontract any work to be done at the site of construction, alteration, painting or repair of a building, structure or other work, except to a person, firm or corporation, party to a current labor agreement with the Union, or the basic crafts; namely, the Carpenters, Cement Masons, Operating Engineers and Teamsters who are also party to an agreement covering the particular work generally recognized as the jurisdiction defined by the Building Construction Trades Department."

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[2]Prior to conducting an election among the landscape employees of Sun-Land, the Board notified Respondent AFFILIATED LABORERS LOCAL 652 as a "potential intervenor" to ascertain whether or not it wished to take part in the election. AFFILIATED LABORERS LOCAL 652 declined to participate in the election proceeding because it did not represent any of the landscape employees of Sun-Land.

[3]Since 1980, Respondents have also been signatory to collective bargaining agreements with the California Landscape and Irrigation Council ("CLIC") whose membership consists of landscape contractors, some of whom perform the same type of commercial and industrial landscape work as Sun-Land.

Although landscape work of the type performed by Sun-Land falls within the coverage of such collective bargaining agreements, Respondents do not consider Sun-Land's collective bargaining agreement with the IUC to be "an appropriate current labor agreement" within the purview of the foregoing subcontracting clause. Thus, Sun-Land is ineligible for subcontracts from members of the various multi-employer associations and other employers signatory to a collective bargaining agreement with Respondents.

Proceedings Below

On February 28, 1983, Petitioner filed a Complaint for damages, declaratory and injunctive relief in the United States District Court for the Central District of California alleging that Respondents had entered into, enforced and/or reaffirmed agreements with various multi-employer associations whereby the members of such multi-employer associations and other signatory employers agreed to cease or refrain from doing business with other employers and/or persons, including Petitioner, in violation of section 8(e) of the National Labor Relations Act, as amended [29 U.S.C. § 158(e)] ("NLRA"). In addition, Petitioner alleged that the aforesaid "agreements" unreasonably restrained and/or monopolized trade in the Southern California landscape industry in violation of Sections 1 and 2 of the Sherman Act [15 U.S.C. §§ 1 and 2].

On or about April 30, 1984, the district court orally granted Respondents' motion for summary judgment on the first, sixth and seventh causes of action alleged in the Complaint and denied Petitioner's cross-motion for summary judgment on the same counts. A Notice of Appeal was timely filed by Petitioner on or about May 25, 1984.

The district court subsequently issued an exhaustive Memorandum of Decision setting forth its findings of fact and conclusions of law regarding the issues presented by the parties' cross-motions for summary judgment.[4] The district court concluded that "the Court's holding in *Woelke* [*& Romero Framing, Inc. v. N.L.R.B.*, 456 U.S. 645 (1982)] appears to validate the subcontracting limitations in this case ... [and] forecloses [Petitioner's] cause of action for violation of section 8(e) of the NLRA" (Appendix D at 8). In addition, the district court expressly adopted Respondents' argument "that once a subcontracting limitation is found to be valid under section 8(e) of the NLRA, it is also exempt from antitrust scrutiny" (Appendix D at 8-9). No other issues of fact or law were presented, considered or addressed by the district court.

On August 27, 1985, a three-judge panel of the Court of Appeals issued its opinion and judgment affirming the district court's holding that the challenged subcontracting clause are within the protection of the construction industry proviso to section 8(e) of the NLRA. However, the three-judge panel "reverse[d] the district court's automatic exemption holding and remand[ed] for its initial determination of whether the nonstatutory exemption applies in this case under the proper approach of balancing labor and antitrust policies," *i.e.*, whether "the agreements are the last restrictive means of accomplishing the legitimate labor goals" (Appendix C at 10).

On or about September 9, 1985, Respondents timely filed and served a Petition For Rehearing and Suggestion

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[4]In response to the parties' separate requests to correct the Memorandum of Decision and Order, the district court subsequently issued a Second Amended Memorandum of Decision and Order on November 19, 1984, which appears as Appendix D.

For Rehearing En Banc. The Court of Appeals ordered this case to be reheard *en banc* and withdrew the three-judge panel decision on January 9, 1986 (Appendix B, *infra*).

On July 8, 1986, the limited *en banc* panel of the Court of Appeals issued its opinion in this case. A majority (7-4) of the *en banc* Court, in an opinion written by Judge Boochever, concluded that, as a matter of law, the challenged union-specific subcontracting clause was within the construction industry proviso to section 8(e) of the NLRA based upon this Court's reasoning in *Woelke*. Although the *en banc* Court expressly rejected the district court's ruling that "the [section 8(e) construction industry] proviso does not confer automatic exemption from the antitrust laws," it nevertheless held that unless "shown to be instruments of an antitrust conspiracy otherwise existing . . . a valid subcontracting clause contained in a collective bargaining agreement cannot serve as the basis of an antitrust claim" (Appendix A at 14). The *en banc* Court also concluded, by a narrow majority (6-5), that "Sun-Land made no showing of conduct allegedly violative of the antitrust laws other than the collective bargaining agreement subcontracting provision" and, therefore, held that "summary judgment against Sun-Land was proper, although the district court may not have expressly relied upon this rationale . . ." (Appendix A at 15-16).

The *en banc* minority, in a dissenting opinion written by Judge Wiggins and joined by Judges Kennedy, Alarcon and Brunetti, concluded that since the challenged union specific subcontracting clause "is consistent with the union's intent to accomplish two different purposes, one legal and one illegal," it was not "within the construction industry proviso to section 8(e) as a matter of law" and,

therefore, would have remanded to the district court to "determine the parties' actual intent as a matter of fact" (Appendix A at 20). The *en banc* minority also concluded that "the issues of sufficiency of the complaint and the existence of material issues of disputed fact were not addressed by the parties below, have never been argued by the parties, and are unreachable in the present posture of this case . . ." (Appendix A at 29). Nevertheless, the *en banc* minority declared that "[t]he complaint below in fact alleged the additional anticompetitive intent and conduct required by the majority's analysis, and Sun-Land continues to press those claims to this day" (Appendix A at 24).

Chief Judge Browning filed a separate opinion "concur[ring] in the *en banc* majority opinion except its treatment of parties' stipulation" and "agree[ing] with the dissent that the stipulation was meant only to specify the issues appropriate for summary judgment, and not to foreclose the parties from pursuing other legal theories if both summary judgment motions were denied . . ." (Appendix A at 30).

REASONS FOR GRANTING THE WRIT

This case raises important federal questions involving the interpretation of the so-called "construction industry proviso" to section 8(e) of the NLRA and the proper accommodation between the congressional policies expressed in federal labor and antitrust legislation. These questions were separately addressed by this Court in *Woelke, supra,* and in *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100,* 421 U.S. 616 (1975) ("*Connell*"), but the precise issues posed in this case were left unanswered by the Court. This case also involves an egregious departure from the accepted and usual

course of judicial proceedings by the *en banc* Court of Appeals.

The issue of whether a union specific subcontracting clause contained in a collective bargaining agreement is invariably exempt from antitrust scrutiny under the Sherman Act was expressly unanswered by this Court in *Connell,* although the Court prophesized "that a restraint of this magnitude *might* be entitled to an antitrust exemption if it were included in a lawful collective bargaining agreement." 421 U.S. at 625-26. However, this Court recognized that union specific subcontracting clauses invest the specified union with "complete control over subcontract work offered by general contractors that had signed agreements" and "could result in significant adverse effects on the market and on consumers, effects unrelated to the union's legitimate goals of organizing workers and standardizing working conditions." *Id.* at 624-625. The decision of the *en banc* Court of Appeals nevertheless suggests "that subcontracting clauses within the construction industry proviso to section 8(e) must be given breathing room to operate in their intended fashion without interference from the antitrust laws," and that any "anticompetitive effect is part of the natural operation of a subcontracting clause . . ." (Appendix A at 14).

The *en banc* Court's conclusion that an otherwise "valid subcontracting clause contained in a collective bargaining agreement cannot serve as the basis of an antitrust claim" contradicts this Court's fractured decisions in *United Mine Workers v. Pennington,* 381 U.S. 657 (1965) ("*Pennington*") and *Local Union No. 180, Amalgamated Meat Cutters v. Jewel Tea Co.,* 381 U.S. 676 (1965) ("*Jewel Tea*"), was expressly unanswered by the Court in *Connell, supra,* and abdicates any examination of the challenged provision(s) of a collective bargaining agreement to de-

termine whether the "least restrictive means" of accomplishing some legitimate union objective have been employed. This Court has previously recognized that "the methods the union chose are not immune from antitrust sanctions simply because the goal is legal." *Connell,* 421 U.S. at 623. However, the decision of the *en banc* Court holds that a *prima facie* antitrust claim must allege facts similar to those of *Pennington, i.e.,* "an antitrust conspiracy otherwise existing" (Appendix A at 14), and refuses to recognize the *alternative* basis for establishing antitrust liability authorized by this Court in *Jewel Tea,* which was summarized in Judge Hufstedler's concurring and dissenting opinion in *Ackerman-Chillingsworth v. Pacific Electrical Contractors Association,* 579 F.2d 484, 502-503 (9th Cir. 1978). As Judge Hufstedler explained, the nonstatutory labor exemption may be forfeited under one of two *different* circumstances: (1) "a union may not combine with one set of employers and agree to impose terms of a union-employer accord on other employers who are competitors of the first employer and not parties to the agreement," as in *Pennington;* or (2) where the agreement's "anticompetitive effect is independent of the restriction directly necessary to serve labor concerns," as illustrated by the "least restrictive means" analysis applied by this Court in *Jewel Tea.* This latter approach was expressly adopted by the three-judge panel of the Court of Appeals below, which remanded the case to the district court with instructions to apply the "least restrictive means" analysis (Appendix C at 10). The *en banc* Court below completely ignored the *alternative* "least restrictive means" basis of antitrust liability established by this Court in *Jewel Tea* in favor of the more traditional "conspiracy" theory presented in *Pennington.*

This case also presents the Court with the opportunity to reconcile the paramount rights of employees under

section 7 of the NLRA [29 U.S.C. § 157] "to bargain collectively through representatives of their own choosing" with its holding in *Woelke* that the "construction industry proviso to section 8(e) . . . *ordinarily* shelters union signatory subcontracting clauses that are sought or negotiated in the context of a collective bargaining relationship." 456 U.S. at 666 (emphasis added). The decision of the *en banc* Court below inexplicably neglected this important issue and instead subordinated employees' fundamental section 7 rights to the section 8(e) construction industry proviso, contrary to the express intent of Congress.

The *en banc* Court's rigid application of *Woelke* to sanctify all union subcontracting clauses solely because they are incorporated by a collective-bargaining agreement impairs the paramount rights of employees under section 7 of the NLRA "to bargain collectively through representatives of their own choosing" and conflicts with the basic intent of Congress in enacting section 8(e) to restrict the ability of unions to use subcontracting clauses as a broad, top-down organizational weapon. *Connell,* 421 U.S. at 1840. This Court has recognized that "[t]he top down organizing effect of subcontracting clauses sought or negotiated in the context of a collective-bargaining relationship is limited in a number of ways by other provisions of the [NLRA]." *Woelke,* 456 U.S. at 663-64. However, the Court's opinion in *Woelke* does not decide whether union signatory subcontracting clauses are invariably protected by the section 8(e) construction industry proviso *solely* because they are contained in a collective-bargaining agreement in the absence of any applicable limitation upon top-down organizing or safeguard provided by the NLRA. These countervailing factors were not present in *Woelke*, and were raised by Petitioner but ignored by the *en banc* Court below.

The *en banc* Court correctly rejected Respondent's argument that "once an agreement is found to be within the construction industry proviso to section 8(e), it is entirely and invariably beyond the reach of the antitrust laws," which had been adopted by the district court. Nevertheless, a narrow majority (6-5) of the *en banc* Court "affirm[ed] the district court because Sun-Land made no showing of conduct allegedly violative of antitrust laws other than the collective bargaining agreement's subcontracting provision," which alone "cannot serve as the basis of an antitrust claim," although the *en banc* Court openly conceded that "the district court may not have expressly relied on this rationale" (Appendix A at 14, 16). The *en banc* majority's affirmance of the district court's judgment based on a rationale that was raised *sua sponte* during oral argument before the *en banc* Court, and which was not expressly relied upon (or even considered) by the district court or litigated by the parties, and without allowing Petitioner "to address at least once the issue that forms the basis for the majority's decision against it" (Appendix A at 29), is patently unfair and a gross miscarriage of justice. The sufficiency of the pleadings under the antitrust standard devised by the *en banc* Court below is, of course, a question of fact which Petitioner was entitled to fully and fairly litigate and have determined by the district court. The *en banc* majority's flagrant disregard of the pleadings, Joint Statement of Uncontroverted Facts and Issues of Law Re: Cross-Motions For Summary Judgment, and applicable summary judgment standards far exceed the accepted and usual course of judicial proceedings by an appellate court and, therefore, warrants the exercise of this Court's power of supervision.

ARGUMENT

The Court Of Appeal's Decision Presents Important Federal Questions, Previously Unanswered By This Court, Concerning The Scope Of The Construction Industry Proviso To Section 8(e) Of The NLRA.

In *Woelke, supra,* this Court was asked "to decide whether union signatory clauses that are sought or negotiated in the context of a collective-bargaining relationship are protected by the construction industry proviso to § 8(e) of the [NLRA]." 456 U.S. at 653. The Court acknowledged "that secondary subcontracting agreements like those at issue here create top-down organizing pressure," *id.* at 663, but reasoned that "[t]he top-down organizing effect of subcontracting clauses sought or negotiated in the context of a collective-bargaining relationship is limited in a number of important ways by other provisions of the [NLRA]," and that subcontractors can "ensure that they remain eligible for work by entering into a § 8(f) agreement — known as a prehire agreement — with the union." *Id.* at 663-64. Thus, the Court held "that the construction industry proviso to § 8(e) of the [NLRA] *ordinarily* shelters union signatory subcontracting clauses that are sought or negotiated in the context of a collective-bargaining relationship, even when not limited to particular jobsites at which both union and nonunion workers are employed." *Id.* at 666 (emphasis added).

This case presents the Court with the opportunity to delineate the scope of the construction industry proviso to section 8(e) of the NLRA and to reconcile the paramount rights of employees under section 7 of the NLRA "to bargain collectively through representatives of their own choosing" with its holding in *Woelke.* Such a determination, of necessity, will require a reexamination of the

Congressional purpose in enacting section 8(e) and its construction industry proviso, which was initially articulated by this Court in *National Woodwork Manufacturers Ass'n v. N.L.R.B.*, 386 U.S. 612 (1976), reiterated in *Connell* and *Woelke*, and in need of further clarification by this Court to resolve ambiguities remaining after *Woelke*. Indeed, the district court, the three-judge panel and the limited *en banc* panel of the Court of Appeals below conceded that "*Woelke* does not specifically address the 'other union' situation" (Appendix A at 7; Appendix C at 7; Appendix D at 7), but upheld the challenged union specific subcontracting clauses herein nonetheless. In addition, the *en banc* Court acknowledged that none of the assumptions made by this Court in *Woelke* "appears valid in Sun-Land's situation," but concluded that "[w]hile the Court in *Woelke* mentioned these points as considerations, neither was controlling" (Appendix A at 8).

Neither the district court, the three-judge panel or the limited *en banc* panel of the Court of Appeals considered or attempted to reconcile the legislative history and purpose of section 8(e) and its construction industry proviso with the paramount rights of Petitioner's employees under section 7 of the NLRA. This Court has emphasized "[o]ne of the major aims of the 1959 Act was to limit 'top-down' organizing campaigns, in which unions used economic weapons to force recognition from an employer regardless of the wishes of his employees," *Connell*, 421 U.S. at 632, and that "[i]n contrast to the latitude it provided in the garment industry proviso, Congress did not . . . otherwise indicate that [construction unions] were free to use subcontracting agreements as a broad organizational weapon." *Id.* at 630.

The decision of the *en banc* Court herein simply ignores the countervailing interests and rights of employees

under section 7 of the NLRA, and subordinates their paramount statutory claims to "the apparent intent of Congress in enacting the section 8(e) proviso" (Appendix A at 8). However, as this Court explained in *Connell*, "§ 8(e) must be interpreted in light of the statutory setting and the circumstances surrounding its enactment." 421 U.S. at 628. Hence, since "[b]asic national labor policy, reflected in section 8(e) declares hot cargo agreements to be illegal" and "[t]he construction industry proviso to section 8(e) is an *exception* to this basic rule," the dissenting opinion of the *en banc* Court below cautioned that the proviso "should thus be interpreted narrowly, so as to reach the Congressional goal in creating it, but go no further" (Appendix A at 20). Congress certainly did not intend that employees' section 7 rights be subordinated to a union's "top-down" organizational objectives under the construction industry proviso to section 8(e) of the NLRA. On the contrary, appropriate statutory construction mandates that the construction industry proviso to section 8(e) be harmonized with section 7 by tempering the union's *legitimate* objective(s) in a manner which accommodates employees' inviolate section 7 rights. The decision of the *en banc* Court below, however, fails to perform this delicate statutory balance.

The opinion of the *en banc* Court below also failed to consider the deleterious effect of union-specific subcontracting clauses, which render Petitioner ineligible for work with general contractors, owners and developers signatory to a collective bargaining agreement with Respondents solely because Petitioner is party to a collective bargaining agreement with the "wrong union" selected by its employees. This agreement is not a mere "pre-hire" agreement which may be disregarded at the whim of Petitioner. *Cf. Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983) and *NLRB v. Local 103 International Associa-*

tion of Bridge, Structural & Ornamental Ironworkers (Higdon Construction Co.), 434 U.S. 335 (1978). Yet this Court in *Woelke* premised the validity of union signatory subcontracting clauses under the construction industry proviso to section 8(e) of the NLRA upon the safeguards provided by the NLRA which limit the union's means of enforcement of such clauses and enable subcontractors to enter into so-called "pre-hire" agreements with non-majority construction trade unions pursuant to section 8(f) of the NLRA in order to remain or become eligible for work from signatory general contractors. 456 U.S. at 664-65. *Accord Jim McNeff, Inc. v. Todd, supra.* The Court did not, however, address Petitioner's situation in which it cannot lawfully extricate itself from its collective bargaining relationship with the "wrong union" and enter into a "pre-hire" agreement with Respondents of any of the other "approved" unions and thereby acquire eligibility for "union work" in the Southern California building and construction industry. Such conduct by Petitioner would clearly be in violation of the NLRA. *See, e.g., Roberts Electric*, 227 NLRB No. 194 (1976); *N.L.R.B. v. Stockton Door*, 547 F.2d 489 (9th Cir. 1976), *enforcing* 218 NLRB No. 156 (1975). Hence, this Court's rationale in *Woelke* that union signatory subcontracting restrictions are not violative of section 8(e) because of the availability of pre-hire agreements simply does not apply herein, was not considered by the *en banc* Court below, and has not been addressed by this Court heretofore.

Finally, the Court in *Woelke* sustained union-signatory subcontracting clauses based on the assumption that there is generally only one union representing a particular trade or craft in the construction industry, and that a majority of workers skilled in particular craft will belong to that union. 456 U.S. at 663 n.15. However, that assumption is also untenable in the present case because a

variety of unions, including Respondents and the IUC, represent employees who perform landscape work in the Southern California building and construction industry. This case presents the very real problem of excluding a subcontractor *solely* because its employees have selected one particular union as opposed to another as their collective-bargaining representative, which was not present or addressed by the Court in *Woelke*.

Clarification of the extent of the construction industry proviso to section 8(e) of the NLRA is needed in view of the ambiguities of this Court's decision in *Woelke* noted by the *en banc* Court below. It is unclear whether this Court intended to approve all variety of union signatory subcontracting clauses solely if "sought or negotiated in the context of a collective bargaining relationship," regardless of scope, the availability of top-down organizing limitations and safeguards provided by the NLRA to preserve the paramount section 7 rights of employees, or the degree of overlap between unions representing and constituted by a majority of workers in a particular craft. This case presents the Court with the opportunity to provide definitive guidance on precisely when and under what circumstances these union signatory subcontracting agreements are within the ambit of the construction industry proviso to section 8(e) of the NLRA. The Court should exercise this opportunity in view of the substantial statutory issues raised herein and the conflicting interpretations of the section 8(e) proviso by the *en banc* Court below.

The Court Of Appeals' Decision Presents Important Federal Questions, Previously Unanswered By This Court, Concerning The Proper Accommodation Between The Construction Industry Proviso To Section 8(e) Of The NLRA And The Sherman Act.

In *Connell, supra,* this Court held that a union specific subcontracting agreement "which is outside the context of a collective bargaining relationship and not restricted to a particular jobsite, but which nonetheless obligates [the signatory employer] to subcontract work only to firms that have a contract with [a specified union], may be the basis of a federal antitrust suit . . ." 421 U.S. at 635. The Court reasoned that "[t]his kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions . . ." which are "unrelated to the union's legitimate goals of organizing workers and standardizing working conditions." *Id.* at 625. Since the union specific subcontracting agreement in *Connell* was plainly "outside the context of a collective bargaining relationship," it was not sanctioned by the construction industry proviso to section 8(e) of the NLRA and, therefore, was not entitled to a nonstatutory exemption from the antitrust laws. *Id.* at 633. Although the Court prophesized that "a restraint of this magnitude *might* be entitled to an antitrust exemption if it were included in a lawful collective-bargaining agreement," *id.* at 625-26 (emphasis added), it did not address or decide that abstract issue in *Connell.* This is the precise issue presented in this case.

This Court has recognized "that a proper accommodation between the Congressional policy favoring collective bargaining under the NLRA and the Congressional policy

favoring free competition in business markets requires some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanction." *Connell,* 421 U.S. at 622. However, the Court has been sharply divided over the application of the nonstatutory labor exemption in its decisions.

In *Jewel Tea, supra,* the opinion of the Court held that a marketing hours restriction of a multi-employer agreement was within the nonstatutory labor exemption because it was so "intimately related to wages, hours and working conditions" that the union's successful efforts resulted from "bona fide arm's length bargaining" in pursuit of its own labor objectives and "not at the behest of or in combination with non-labor groups." 381 U.S. 689-90. The opinion of the Court in *Pennington* held that an industry-wide collective bargaining agreement intended "to secure uniform labor standards throughout the industry, if proved, was not exempt from the antitrust laws." 381 U.S. at 669. Justice Goldberg, joined by Justice Harlan and Stewart, wrote a separate opinion dissenting from the opinion of the Court in both *Jewel Tea* and *Pennington,* but concurring in the judgment of the Court in *Jewel Tea,* on the basis that "collective bargaining acitivty concerning mandatory subjects of bargaining under the [NLRA] is not subject to the antitrust laws." 382 U.S. at 710. Justice Douglas, joined by Justices Black and Clark, wrote a separate opinion concurring in the judgment of the Court in *Pennington,* but dissenting from the opinion of the Court in *Jewel Tea,* on the grounds that "the collective bargaining agreement itself . . . was evidence of a conspiracy among the employers and the unions," *Jewel Tea,* 381 U.S. at 736-37, and "is *prima facie* evidence of a violation [of the Sherman Act.]" *Pennington,* 381 U.S. at 673.

This Court's decision in *Connell, supra,* is equally inconclusive. The opinion of the Court concluded that a union-specific subcontracting agreement "which is outside the context of a collective bargaining relationship . . . may be the basis of a federal antitrust suit" and was not "inconsistent with the remedial scheme of the NLRA." 421 U.S. at 634-35. The dissenting opinion of Justice Douglas "conclud[ed] that the union's conduct is regulated solely by the labor laws" but emphasized that "[t]he question of antitrust liability would be far different, however, if it were alleged that Local 100 had conspired with mechanical subcontractors to force nonunion subcontractors from the market by entering into exclusionary agreements with general contractors like Connell," which "was condemned in *Allen Bradley Co. v. Electrical Workers,* 325 U.S. 797 (1945) . . ." Justice Stewart wrote a separate dissenting opinion, joined by Justices Douglas, Brennan and Marshall, which concluded that "Congress did not intend to restore antitrust sanctions for secondary boycott activity such as that engaged in by Local 100 in this case, but rather intended to subject such activity only to regulation under the [NLRA] and § 303 of the Labor Management Relations Act." 421 U.S. at 654-55. However, Justice Stewart's dissenting opinion also noted that "if Connell had truly agreed to limit its subcontracting without any coercion whatsoever on the part of Local 100, the affected subcontractor might well have a valid antitrust claim on the ground that Local 100 and Connell were engaged in the type of conspiracy aimed at third parties with which this Court dealt in *Allen Bradley* [*supra*] . . . [and] would present a very different question from the one before us — a question which is not now necessary to answer." *Id.* at 649 n.9.

The *en banc* Court below held "that a valid subcontracting clause contained in a collective bargaining agreement cannot serve as the basis of an antitrust claim" *unless* "they are shown to be instruments of an antitrust conspiracy otherwise existing" (Appendix A at 14). That rationale was expressly disapproved by Justice Douglas' dissenting opinion in *Jewel Tea,* 381 U.S. at 736-37 ("the collective bargaining agreement itself . . . was evidence of a conspiracy"), his concurring opinion in *Pennington,* 381 U.S. at 673 ("An industry-wide agreement containing those features is prima facie evidence of a violation"), and his dissenting opinion in *Connell,* 421 U.S. at 638, as well as by Justice Stewart's dissenting opinion in *Connell,* 421 U.S. at 649 n.9.

The "union specific" subcontracting clause herein is fraught with the same pernicious anti-competitive effects as the subcontracting agreement before the Court in *Connell* — subcontracting to firms that do not have a labor agreement with the specified union(s) is prohibited — and invest Respondents with "complete control over subcontract work offered by general contractors that had signed these agreements." 421 U.S. at 625-25. The legislative history of the Sherman Act confirms that "Congress feared the concentrated power of business organizations to dominate markets and prices. It intended to outlaw business monopolies. A business monopoly is no less such because a union participates, and such participation is a violation of the [Sherman] Act." *Allen Bradley Co. v. Local Union No. 3, IBEW,* 325 U.S. 797, 811 (1945). *See also, Pennington,* 381 U.S. at 665-66.

As this Court acknowledged in *Connell,* 421 U.S. at 636-37, "the accommodation between federal labor and antitrust policy is delicate," and its scope must be carefully adjusted "to avoid conflict with the labor policy favoring

lawful employee organization," which "is central to federal labor policy." Judge Hufstedler's concurring and dissenting opinion in *Ackerman-Chillingsworth, supra,* confirms that the nonstatutory labor exemption from the antitrust laws may be forfeited in one of two different ways, as illustrated by the Court's decisions in *Pennington* and *Jewel Tea.* However, the *en banc* Court ignores the "least restrictive means" approach utilized by this Court in *Jewel Tea* in favor of limiting antitrust claims to the precise facts and classical "conspiracy" elements present in *Pennington.* No such distinction was drawn by this Court in *Connell*; rather, the Court seemingly reaffirmed the viability of a "least restrictive means" analysis of the provisions of a collective bargaining agreement to determine whether it imposes a "direct restraint on the business market [having] substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions" 421 U.S. at 625. For purposes of the present case, *Jewel Tea* is significant not because of the result reached by this Court (*i.e.,* no antitrust liability existed), but because of the "least restrictive means" analysis utilized by the Court in reaching that result, which is summarized by Judge Hufstedler in *Ackerman-Chillingsworth, supra,* and was adopted by the three-judge panel decision of the Court of Appeals below. The conclusion of the *en banc* Court that a violation of the Sherman Act may *only* be established under the limited facts present in *Pennington* is clearly contrary to this Court's holding in *Jewel Tea.* Certiorari should, therefore, be granted to clarify this important issue.

The *en banc* Court's hypothesis "that subcontracting clauses within the construction industry proviso to section 8(e) must be given breathing room to operate in this intended fashion, without interference from the antitrust

laws" (Appendix A at 14) is stifling. If the mere fact that a restraint upon commerce is contained in a collective bargaining agreement and, therefore, within the ambit of the construction industry proviso to section 8(e) of the NLRA, invariably results in the application of the nonstatutory labor exemption from antitrust scrutiny, Respondents will be afforded "complete control over subcontract work offered by general contractors that had signed these agreements," including the "power to control access to the market." *Connell,* 421 U.S. at 624. In addition, "the restriction on subcontracting would eliminate competition on all subjects covered by the multiemployer agreement, even on subjects unrelated to wages, hours, and working conditions." *Id.*

The antitrust standard articulated by the *en banc* Court below is premised upon the "apparent" holding of this Court in *Pennington* and *Jewel Tea* (Appendix A at 14). This case, therefore, presents the Court with the opportunity to clarify its fragmented decisions in *Pennington, Jewel Tea* and *Connell,* and to provide definitive guidance as to the application of the nonstatutory labor exemption to antitust scrutiny under the Sherman Act.

The Court Of Appeals Far Exceeded The Accepted And Usual Course Of Judicial Proceedings By Affirming The District Court's Judgment On An Entirely Different Rationale Than The District Court Expressly Relied On, Which The Parties Never Litigated, And Is Not Squarely Presented On The Record Below.

The *en banc* Court unanimously rejected the district court's holding that valid subcontracting clauses are automatically exempt from antitrust scrutiny. Yet a bare majority of the *en banc* Court concluded that "[w]hile we refuse to rule that such clauses are wholly exempt from scrutiny if they are shown to be instruments of an anti-

trust conspiracy otherwise existing, we hold that a valid subcontracting clause contained in a collective bargaining agreement cannot serve as the basis of an antitrust claim" (Appendix A at 14). The *en banc* majority thereupon declared that "Sun-Land's evidence of antitrust liability is clearly limited to the subcontracting clauses" and, therefore, concluded that "summary judgment against Sun-Land was proper . . . although the district court may not have expressly relied on the rationale . . ." (Appendix A at 16).

As a "general rule . . . a Court of Appeals may affirm on any grounds squarely presented on the record, even though the trial court may have based its decision on a different ground," *M.O.S. Corporation v. John I. Haas Co.,* 375 F.2d 614, 617 (9th Cir. 1967); *Salermon v. United States,* 724 F.2d 1357, 1364 (9th Cir. 1983), but may do so *only* where the appellant "suffers no prejudice from [the court] analyzing the case in this manner," *In re Duncan,* 713 F.2d 538, 541 (9th Cir. 1983) *and* "if the record presented is such as to permit decision" by the Court of Appeals. *M.O.S. Corporation,* 375 F.2d at 617.

None of the foregoing bases exist in this case. The *sole* issue before the district court was whether the challenged subcontracting restrictions were *automatically* exempt from antitrust scrutiny *solely* because they were contained in a collective bargaining agreement and, therefore, arguably valid under the section 8(e) construction industry proviso. As the *en banc* dissenting opinion emphasized, "neither the parties, the district court, nor the three-judge panel of this Court considered the sufficiency of the complaint under the antitrust standard the majority sets forth today . . . The first time such concerns were raised was at oral argument before the *en banc* panel of this Court" (Appendix A at 27-28). The ground upon

which the *en banc* Court affirmed the district court was *not* raised by Respondents as an issue in the summary judgment proceedings below and, therefore, cannot be raised or adjudicated for the first time on appeal, let alone *sua sponte* during oral argument before the *en banc* Court. There is, therefore, no support in the record for the *en banc* majority's affirmance of the district court on the illusory ground "that Sun-Land's claims did not raise a triable issue under the Sherman Act" (Appendix A at 4). The record on appeal is unmistakably devoid of any support for the ground attributed to the district court by the *en banc* majority for *granting* summary judgment in favor of Respondents. Petitioner has obviously been *severely prejudiced* by being deprived of the opportunity to ever address the new ground articulated by the *en banc* Court or "to present pertinent evidence." *See Callahan v. Woods*, 736 F.2d 1269, 1275 (9th Cir. 1984).

It is clearly established that "[u]nless the new issue uncovered by the appellate court was one which was clearly framed by the proceedings below so that the parties had a legitimate chance to submit all relevant materials and argue their implications, it is clearly unjust for the appellate court to direct the issuance of summary judgment on a new issue raised *sua sponte* on appeal." *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1537, 1538-9 (D.C. Cir. 1984) (*en banc*); *Ithica College v. NLRB*, 623 F.2d 224, 229 (2nd Cir. 1980); *E.C. Ernst, Inc. v. General Motors Corp.*, 537 F.2d 105, 109 (5th Cir. 1976). Likewise, where "an issue is not litigated in the trial court . . . [and there exists] no sufficient record upon which to base a decision, the Court of Appeals has an option to follow the trial court and decide only the issue decided by that court; or to remand for a trial [of other essential issues] when that seems appropriate." *M.O.S. Corporation*, 375 F.2d at 617.

Since "the sufficiency of the complaint and the existence of material issues of disputed fact were not addressed by the [district] court below, have not been argued by the parties, and [were] unreachable in the present posture of this case" (Appendix A at 29), the *en banc* Court plainly violated its own clearly established judicial procedures which mandate either affirming the trial court on the issue decided by that court *or* remanding for the determination of any new or different issue(s). *See M.O.S. Corporation, supra.* Accordingly, this Court should exercise its supervisory power to correct this blatant departure from the accepted and usual course of judicial proceedings by the *en banc* Court and afford Petitioner its day in court.

The Court Of Appeals' Analysis Of This Case And The Summary Judgment Proceedings Below Far Exceeds The Accepted And Usual Course Of Judicial Proceedings And Warrants The Exercise Of This Court's Power of Supervision.

The *en banc* Court analyzed the parties' Joint Statement of Uncontroverted Facts and Issues of Law Re: Cross-Motions For Summary Judgment and concluded that "[h]aving stipulated that no issues of law were involved in the action other than those concerning the subcontracting clause, [Petitioner] cannot now seek to raise additional claims" (Appendix A at 15). Based on this conclusion, the *en banc* Court determined that Petitioner had failed to state any facts supporting an antitrust claim and, on that basis held that "summary judgment against Sun-Land was proper" (Appendix A at 16). This determination by the *en banc* Court overlooks the express purpose of the parties' Joint Statement, which Chief Judge Browning emphasized "was meant only to specify the issues appropriate for summary judg-

ment, and not to foreclose the parties from pursuing other legal theories if both summary judgment motions were denied . . ." (Appendix A at 30). Indeed, as the *en banc* dissent acknowledged, "[t]his is apparent from the very caption of the stipulation: 'Joint Statement of Uncontroverted Facts and Issues of Law Re Cross Motions For Summary Judgment' . . . [which] contained only the facts necessary to resolve the purely legal issues presented" (Appendix A at 25-26).

The decision of the *en banc* Court wholly fails to adhere to the law governing appellate review of summary judgments. The fact that both parties simultaneously moved for summary judgment and agreed that there was no genuine issue of material fact on their motions does not constitute a waiver of the judicial determination of whether genuine issues of material fact exist. The very same Court of Appeals has previously emphasized that "[t]his determination does not depend upon what either or both parties may have thought about the matter." *Brawner v. Pearl Assurance Company,* 267 F.2d 45, 46 (9th Cir. 1958). Indeed, although "[a]s this case was presented in the district court it was not apparent that any issue of fact was involved, [a]s the case unfolded in this court, however, genuine issues of material fact . . . have been revealed. Under these circumstances . . . the proper course is to send the case back for a full trial." *Smith v. United States,* 362 F.2d 366, 369 (9th Cir. 1966). By failing to remand this case to the district court for further proceedings on the issues revealed for the first time on rehearing *en banc,* the *en banc* Court violated its own clearly established judicial procedure.

The *en banc* Court's analysis of the parties' Joint Statement as an all-inclusive waiver of any other issues of fact or law is equally ignoble. A party moving for sum-

mary judgment concedes the absence of any genuine issues of material fact and the truth of the nonmoving party's allegations *only* for the purpose of his motion; there may nevertheless be issues of material fact in the event the moving party's theory is rejected or his opponents is adopted. *See, e.g., Zook v. Brown,* 748 F.2d 1161 (7th Cir. 1984); *McKenzie v. Sawyer,* 684 F.2d 62 (D.C. Cir. 1982); *Carlson v. New Hampshire Department of Safety,* 609 F.2d 1024, 1025 n.1 (1st Cir. 1979). Hence, the assertion that there are no other issues of material fact may not be used against a party if the court grants its adversary's motion for summary judgment. Nevertheless, that is precisely what the *en banc* Court did in this case.

The *en banc* Court also improperly failed to require Respondents to meet their burden in moving for summary judgment to establish that no genuine issue of material fact exist and that they were entitled to a judgment as a matter of law. *See Adickes v. S.H. Kress and Co.,* 398 U.S. 144, 157 (1970); *Celotex Corp. v. Catlett,* 106 S.Ct. 2548 (1986); *Watts v. U.S.,* 703 F.2d 346, 347 (9th Cir. 1983). This Court has consistently held that, in reviewing summary judgments on appeal, all inferences must be made in the light most favorable to the opposing party. *Adickes v. S.H. Kress, supra; U.S. v. Diebold, Inc.,* 369 U.S. 654, 655 (1962); *Pollyer v. Columbia Broadcasting Systems, Inc.,* 368 U.S. 464 (1962). *Accord Shroeder v. Owens-Corning Fiberglass Corporation,* 514 F.2d 901 (9th Cir. 1975); *Celnetics Corporation v. Volkswagon of America, Inc.,* 532 F.2d 674 (9th Cir. 1976). The *en banc* Court unilaterally determined that no genuine issue of material fact existed and thus improperly relieved Respondents of their burden of proof and deprived Petitioner of the benefit of all inferences favorable to it in the underlying summary judgment proceeding.

The *en banc* Court blatantly disregarded established law governing appellate review of summary judgments, and severely prejudiced Petitioner by denying it the opportunity to address the sufficiency of the pleadings under the new antitrust standard, which was raised *sua sponte* during oral argument before the *en banc* Court. This Court should, therefore, exercise its power of supervision to correct the *en banc* Court's gross departure from the accepted and usual course of judicial proceedings.

CONCLUSION

For the reasons set forth above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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December 16, 1986.

APPENDIX A

OPINION

UNITED STATES COURT OF APPEALS

For The Ninth Circuit

SUN-LAND NURSERIES, INC.,
a California corporation,
Plaintiff-Appellant,

v.

SOUTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS; AFFILIATED LABORERS LOCAL UNION 300; AFFILIATED LABORERS LOCAL UNION 652; and AFFILIATED LABORERS LOCAL UNION 1082,
Defendants-Appellees.

Appeal From The United States District Court
For The Central District of California
Hon. Robert J. Kelleher, District Judge, Presiding

Argued and Submitted —
March 18, 1985 — San Francisco, California

No. 85-6029
D.C. No. CV 83-1211RJK

Before: BROWNING, Chief Judge, KENNEDY, FLETCHER, PREGERSON, ALARCON, CANBY, BOOCHEVER, NORRIS, REINHARDT, WIGGINS and BRUNETTI, Circuit Judges.

BOOCHEVER, Circuit Judge:

Filed: July 8, 1986 Cathy A. Catterson, Clerk
U.S. Court of Appeals

In this appeal we are required to construe a provision of the National Labor Relations Act (NLRA) and to reconcile policies expressed in labor and antitrust legislation.

Sun-Land Nurseries, Inc. (Sun-Land) appeals from a summary judgment denying its claims under the NLRA and sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1982). It contends that collective bargaining agreements restricting subcontracting to employers which use employees of specified unions violate section 8(e) of the NLRA, 29 U.S.C. § 158(e) (1982). Section 8(e), in general terms, prohibits "hot cargo" agreements, provisions requiring employers to cease doing business with any other person. Sun-Land further agrues that the agreements constitute antitrust violations under the Sherman Act. A panel of this court affirmed the district court's holding that the agreement comes within the proviso to section 8(e) which exempts the construction industry from that section's terms. The panel, however, reversed the district court's award of summary judgment to the union on the Sherman Act claims. *Sun-Land Nurseries, Inc. v. Southern California District Council of Laborers,* 769 F.2d 1381 (9th Cir. 1985) *withdrawn,* 779 F.2d 1446 (9th Cir. 1986) (ordering rehearing en banc).

We took this case en banc to determine whether a provision of a collective bargaining agreement falling within the construction industry proviso is, without more, sufficient evidence of an antitrust violation to withstand a summary judgment motion. While we find that the proviso does not confer automatic exemption from the antitrust laws, we affirm the district court because Sun-Land made no showing of conduct allegedly violative of antitrust laws other than the collective bargaining agreement's subcontracting provision. We hold that such a provision is not enough to raise a triable issue of antitrust liability.

I.

FACTS

Sun-Land is a landscaping company which contracts with general contractors on major construction projects. The present dispute arose after the Teamsters Local 420 (Teamsters) terminated its representation of Sun-Land's employees either because of an internal power struggle or in the hope of improving its relations with the Southern California District Council of Laborers (Laborers). Sun-Land sued the Teamsters, and this court held that the termination constituted a violation of the collective bargaining agreement between the Teamsters and Sun-Land. *Toyota Landscape Co. v. Building Material & Dump Truck Drivers Local No. 420,* 726 F.2d 527-29 (9th Cir.), *cert. denied,* 105 S.Ct. 104 (1984). In the meantime, however, Sun-Land's employees elected the Indpendent Union of Craftsmen (Independent Union) as their new bargaining representative.

Many of the general contractors in the area in which Sun-Land does business are parties to various multi-employer agreements that prohibit the subcontracting of work to any employer that does not have a current bargaining agreement with the Laborers or one of the basic craft unions specifically named in the agreements (the Major Unions).[1] Sun-Land claims that, as a result of

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[1]The 1980-83 Master Labor Agreement provides:

> [N]either the Contractor nor any Subcontractor on the jobsite will subcontract any work to be done at the site of construction, alteration, painting or repair of a building, structure or other work, except to a person, firm or corporation, party to a current labor agreement with the Union, or the basic crafts, namely, the Carpenters, Cement Masons, Operating Engineers and Teamsters who are also party to an agreement covering the particular work generally recognized as the jurisdiction as defined by the Building and Construction Trades Department.

these subcontracting limitation clauses and its lack of affiliation with either the Laborers or any of the Major Unions, its business sufferd drastically and hence the quantity of goods it purchased in interstate commerce declined. It therefore brought suit against the Laborers arguing that the subcontracting clauses constitute both an unfair labor practice under section 8(e) of the NLRA and an unreasonable restraint of trade under sections 1 and 2 of the Sherman Act.

The district court filed an exhaustive and well-reasoned opinion granting summary judgment in favor of the Laborers. The court held that under the construction industry proviso, the challenged clauses are exempt from section 8(e)'s prohibition against hot cargo agreements, and that Sun-Land's claims did not raise a triable issue under the Sherman Act. The district court reasoned that *Woelke & Romero Framing, Inc. v. NLRB,* 456 U.S. 645 (1982) (*Woelke*), compelled the section 8(e) holding and relied on *Brogan v. Swanson Painting Co.,* 682 F.2d 807 (9th Cir. 1982), for its holding on the antitrust issue. The district court concluded that *Brogan* amounted to an implicit rejection of the balancing of labor and antitrust policies advanced by one member of the panel in *Ackerman-Chillingworth v. Pacific Electrical Contractors Association,* 579 F.2d 484, 501-05 (9th Cir. 1978) (Hufstedler, Jr., concurring in part and dissenting in part), *cert. denied,* 439 U.S. 1089 (1979). Finally, the district court concluded that its award of summary judgment dismissing the antitrust claim was not inconsistent with *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100,* 421 U.S. 616 (1975), or *Union Mine Workers v. Pennington,* 381 U.S. 657 (1965).

The panel affirmed the district court's section 8(e) holding. It also held that restrictive subcontracting agreements are valid under the Sherman Act only to the extent

that they are the "least restrictive means" of accomplishing legitimate labor goals, and it remanded for a balancing of labor and antitrust policies. This court withdrew that opinion and ordered rehearing en banc. 779 F.2d 1446 (9th Cir. 1986) (en banc.)

II.

CONSTRUCTION INDUSTRY PROVISO

Sun-Land argues that the "particular unions" subcontracting clauses violate section 8(e) of the NLRA. There are no material facts in dispute and both parties agree that the clauses fall within the general prohibition of section 8(e).[2] Both parties also agree that a literal reading of the construction industry proviso would exempt the clauses from section 8(e) liability.[3] The parties do dispute the applicability of the proviso in light of legislative

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[2]Section 8(e) of the NLRA provides in part:

> (e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void . . . .

29 U.S.C. § 158(e).

[3]The construction industry proviso to section 8(e) states:

> *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.

29 U.S.C. § 158(e).

history and judicial interpretation. This issue is reviewable de novo. *United States v. McConney*, 728 F.2d 1195, 1202-04 (9th Cir.) (en banc), *cert. denied*, 105 S. Ct. 101 (1984).

Sun-Land notes that the Supreme Court has held that the construction industry proviso is not to be construed literally but " 'must be interpreted in light of the statutory setting and the circumstances surrounding its enactment' " in 1959. *Woelke*, 456 U.S. at 653 (quoting *Connell*, 421 U.S. at 628). It points to *Connell*, where the Court interpreted these circumstances and held that, despite the literal language of the proviso, Congress had not intended to insulate from liability agreements obtained outside the context of collective bargaining. *See Connell*, 421 U.S. at 633. The Laborers counter that their agreement arose within a collective bargaining relationship and that *Woelke* held that a similar subcontracting clause fit within the construction industry proviso. We agree that the *Woelke* decision applies to the clause at issue here.

In *Woelke*, the Court was faced with a subcontracting limitation clause very similar to that of the Laborers' Agreement.[4] The Court rejected the nonunion employer's claim that the proviso shelters subcontracting clauses

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[4]The clause in *Woelke* provided:

> The Contractor agrees that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, san[d] and gravel plants, asphalt plants, ready-mix concrete plants, established on or adjacent to the job-site to process or supply materials for the convenience of the Contractor for jobsite use) except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement.

456 U.S. at 649 n.1.

only when they are limited in application to particular jobsites at which both union and non union workers are employed. 456 U.S. at 654. The court concluded that the "construction industry proviso to § 8(e) . . . ordinarily shelters union signatory subcontracting clauses that are sought or negotiated in the context of a collective-bargaining relationship . . . ." *Id.* at 666.

Sun-Land argues that *Woelke* is distinguishable for a number of reasons. Most importantly, Sun-Land contends that *Woelke* only sanctioned subcontracting clauses that operate to exclude *non-union* contractors; the clause here excludes "other-union" subcontractors. While *Woelke* does not specifically address the "other-union" situation, its teaching that whether a clause is within the coverge of the proviso is determined "by examining Congress' perceptions regarding the status quo in the construction industry," *id.* at 657, directs us to uphold the Laborers' subcontracting clause. Congress believed broad subcontracting clauses were legal in 1959. *Id.* Despite its awareness that such clauses could be used to exclude subcontractors represented by other unions, as well as non-union employers, it enacted the proviso. *Woelke* recites the legislative history of section 8(e), which includes a reference to the other-union situation:

> The House Labor Committee heard similar testimony. Representatives of an employer and an independent union complained that employers and unions could lawfully enter into subcontracting clauses, and that, as a result, employers whose employees had selected another union were denied any opportunity to compete for construction jobs. They described agreements very similar to those at issue here.

Woelke, 456 U.S. at 658 (citing *Labor-Management Reform Legislation: Hearings on H.R. 3540, H.R. 3302, H.R. 4473, and H.R. 4474 before a Joint Subcomm. of the House Comm.*

on Education and Labor, 86th Cong., 1st Sess. 2363, 2365-66 (1959) (remarks of Howard Lane and Edward M. Carlton)). Congress heard this argument but nevertheless "decided to exclude the construction industry from the scope of § 8(e)." *Woelke,* 456 U.S. at 658 n.10. We must give effect to Congress' intent and hence affirm the district court's conclusion that the construction industry proviso covers the agreement before us. Whether the section 8(e) proviso applies to union specific subcontracting clauses has been resolved by *Woelke* and we do not have the power to reexamine that question as suggested by the dissent.[5]

Sun-Land also argues that *Woelke* does not control this agreement because *Woelke* sustained subcontracting restrictions on the basis of two assumptions: that there is generally only one union representing a particular craft, and that subcontractors could enter into single job "prehire" agreements with the designated union and thus remain eligible to work. Neither of these assumptions appears valid in Sun-Land's situation. Several unions represent landscaping employees. Any agreement with the Laborers would violate Sun-Land's collective bargaining agreement with the Independent Union. While the Court in *Woelke* mentioned these points as considerations, *see Woelke,* 456 U.S. at 663 n.15, 664, neither was controlling. The Court did recognize that "the use of union signatory subcontracting clauses [may] give a particular

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[5]In addition, the dissent would require a trial over the purpose of a subcontracting clause even though the issue is not specifically raised by the defendant, or if raised, no proof of impermissible purpose is submitted in response to a motion for summary judgment. Such a requirement would needlessly encourage litigation, and would tend to thwart the apparent intent of Congress is enacting the section 8(e) proviso.

union a monopoly position in a labor market," *id.* at 663 n.15, yet upheld such clauses nevertheless.

We conclude that the clause under consideration does not violate section 8(e).

III.

ANTITRUST EXEMPTION

Sun-Land argues that, irrespective of the validity of the agreements under section 8(e), those agreements violate sections 1 and 2 of the Sherman Act because they constitute an illegal group boycott and evidence a concerted refusal to deal.[6] The Laborers contend that once a clause is found to be valid under section 8(e), it is automatically exempt from antitrust liability.

Organized labor enjoys two types of exemptions from federal antitrust laws: statutory and nonstatutory. *Granddad Bread, Inc. v. Continental Baking Co.*, 612 F.2d 1105, 1109 (9th Cir. 1979), *cert, denied*, 449 U.S. 1076 (1981). The sources of the statutory exemption include the Clayton Act, 15 U.S.C. § 17 (1982) and 29 U.S.C. § 52 (1982), and the Norris-LaGuardia Act, 29 U.S.C. §§ 104, 105, 113 (1982), which except some union activities from antitrust scrutiny. *Connell*, 421 U.S. at 621-22. "They do not exempt concerted action or agreements between unions and nonlabor parties." Id. at 622. Hence, the statu-

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[6]The dissent contends that the argument presented by Sun-Land is not that "'the contract language is sufficient to *create* liability; it merely urges that the contract language is not sufficient to *insulate* the defendants from liability." *Infra* at _____. [Dissent 6-7] We disagree. The issue on appeal was clearly stated by Sun-Land itself in its opening brief: "Whether the challenged 'particular union' subcontracting restrictions violate Sections 1 and 2 of the Sherman Act irrespective of whether of not they are valid under section 8(e) of the Labor Act."

tory exemption does not apply here because the Laborers combined with nonlabor groups through the collective bargaining agreements.

The Supreme Court has recognized a limited nonstatutory exemption, which "has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions." *Id.* Thus some union-employer agreements are exempt from antitrust sanctions as part of the "proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets." *Id.* The nonstatutory exemption, then, may be invoked in cases involving valid collective bargaining agreements between unions and employers on wages or working conditions.

We cannot accept the Laborers' contention that, once an agreement is found to be within the construction industry proviso to section 8(e), it is entirely and invariably beyond the reach of the antitrust laws. We find a suggestion to the contrary in *United Mine Workers v. Pennington,* 381 U.S. 657 (1965), one of the earliest cases defining the nonstatutory exemption. There the Supreme Court dealt with an alleged conspiracy among major coal companies and a union to drive smaller, competing coal companies out of business. The union was said to have agreed with the major companies to impose a uniform high wage upon the smaller companies "regardless of their ability to pay and regardless of whether or not the union represented employees of these companies, all for the purpose of eliminating them from the industry." *Id.* at 664. The union contended that, because such an agreement concerned wage standards, it was exempt from the antitrust laws. The Supreme Court rejected that defense. The Court recognized that simple wage agreements between unions and multi-employer bargaining units do not

violate the antitrust laws, but added that "[t]his is not to say that an agreement resulting from union-employer negotiations is automatically exempt from Sherman Act scrutiny simply because the negotiations involve a compulsory subject of bargaining . . . ." *Id.* The Court concluded that a union "forfeits its exemption from the antitrust laws" when it becomes a party to a conspiracy with one set of employers to eliminate competitors to those employers. *Id.* at 665-66.

Pennington makes it clear, therefore, that a union that is otherwise guilty of a conspiracy in violation of the antitrust laws cannot escape liability merely because some of the means of accomplishing the goals of that conspiracy were embodied in a collective bargaining agreement. In so holding, the Court emphasized that nothing in national labor policy favored such activity. *Id.* at 666. The Court's decision, however, falls far short of establishing Sun-Land's case. For *Pennington* makes it equally clear that in the absence of such a conspiracy, a union is free to pursue its own bargaining objectives in the traditional way without interference from the antitrust laws. The union in *Pennington* was entitled, for example, to adopt its own uniform wage policy and to seek to implement it even though it suspected that the result would be to deprive some of the weaker employers in the industry of the ability to compete. *Id.* at 665 n.2.

The Supreme Court directly protected parties to a multi-employer collective bargaining agreement from the antitrust laws in *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676 (1965), decided the same day as *Pennington*. In *Jewel Tea*, a fractured Court found that a marketing-hours restriction in a collective bargaining agreement obtained by the unions through "bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the

behest of or in combination with nonlabor groups, [fell] within the protection of the national labor policy and [was] therefore exempt from the Sherman Act." *Id.* at 690 (White, J.) (plurality opinion). Justice White's opinion, joined by two other justices, noted that the "crucial determinant is not the form of the agreement . . . but its relative impact on the product market and the interests of union members." *Id.* at 690 n.5. Because the interest of union members in the hours of operations was immediate and direct, the agreement was beyond the reach of the Sherman Act even though "the effect on competition [was] apparent and real." *Id.* at 691. *Jewel Tea* did not, however, muster a majority for the view that collective bargaining activity concerning mandatory subjects of bargaining could never be subjected to antitrust scrutiny. Justice Goldberg, concurring, embraced that position, but he was joined by only two other justices. The three dissenting justices would have held the agreement a violation of the antitrust laws.

The Supreme Court's most recent case dealing with the nonstatutory exemption is *Connell*. There the Court held that the construction industry proviso to section 8(e) does not apply to agreements obtained outside the context of collective bargaining, 421 U.S. at 633, and that such agreements cannot claim the nonstatutory exemption. *Id.* at 625. The Court merely noted that "[t]here can be no argument in this case, whatever its force in other contexts, that a restraint of this magnitude might be entitled to an antitrust exemption if it were included in a lawful collective-bargaining agreement." *Id.* at 625-26 (citing *Pennington* and *Jewel Tea*).

Two Ninth Circuit cases, although not dealing with subcontracting clauses, generally support our holding. In *California Dump Truck Owners Association, Inc. v. Associated General Contractors*, 562 F.2d 607 (9th Cir. 1977), we

found that a valid collective bargaining agrement, "by itself, does not violate the federal antitrust laws." *Id.* at 614. In *Granddad Bread* we held that a work preservation clause, valid under the nonstatutory exemption, was not sufficient evidence of antitrust violation by itself to justify submission to the jury. 612 F.2d at 1111. In both cases, then, we concluded that evidence in addition to a valid provision of a collective bargaining agreement is required in order to establish an antitrust violation. In neither did we state that such a provision could never be considered as evidence of an antitrust violation, if other evidence was also introduced.

In *Brogan v. Swanson Painting Co.,* 682 F.2d 807 (9th Cir. 1982), this court considered a situation similar to the one at issue here. In determining whether a subcontracting clause was "in violation of § 8(e) and the antitrust laws," *id.* at 810, we concluded that, under *Woelke,* "the construction industry proviso to § 8(e) shelters union signatory subcontracting clauses that are sought or negotiated in the context of a collective bargaining relationship." *Id.* We therefore reversed the district court's judgment holding the clause unenforceable. We did not further elaborate on the scope or nature of the nonstatutory exemption.

Other circuits seem to agree with our holdings. An early Seventh Circuit case, *Suburban Tile Center, Inc. v. Rockford Building & Construction Trades Council,* 354 F.2d 1 (7th Cir.), *cert. denied,* 384 U.S. 960 (1966), holds that an agreement coming within the construction industry proviso does not constitute a violation of the antitrust laws. And the Eleventh Circuit, while noting that it "express[ed] no opinion regarding the application of the nonstatutory exemption to these facts," upheld a grant of summary judgment for the defendant on a subcontracting clause found valid under the proviso to section 8(e) since

no other evidence of antitrust violations was presented. *A.L. Adams Construction Co. v. Georgia Power Co.*, 733 F.2d 853, 855 n.5 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 2155 (1985). Neither case discusses anticompetitive purposes other than those necessary to attain collective bargaining goals which do not violate labor law.

We think it apparent from the Supreme Court's decisions in *Pennington* and *Jewel Tea*, and implicit in decisions of this and other circuits, that subcontracting clauses within the construction industry proviso to section 8(e) must be given breathing room to operate in their intended fashion without interference from the antitrust laws. While we refuse to rule that such clauses are wholly exempt from scrutiny if they are shown to be instruments of an antitrust conspiracy otherwise existing, we hold that a valid subcontracting clause contained in a collective bargaining agreement cannot serve as the basis of an antitrust claim. Yet Sun-Land has attempted to make the clauses the foundation of its antitrust claim here. As the Supreme Court stated in an analogous context, "[n]o case under the antitrust laws could be made out on evidence limited to such union behavior." *Pennington*, 381 U.S. at 665.

We recognize that an agreement restricting subcontracting has anticompetitive effects. It adds nothing to Sun-Land's claim, however, to argue that the intent or the effect of the clauses was to preclude Sun-Land from obtaining contracts because its employees were not represented by Laborers. That anticompetitive effect is part of the natural operation of a subcontracting clause; the goals of federal labor law could never be achieved if every anticompetitive effect on business caused by collective bargaining were held to be a violation of the antitrust laws. *See Connell*, 421 U.S. at 622.

Congress would not have exempted the construction industry from the prohibition against "hot cargo" clauses only to have such provisions create liability under the antitrust laws. Moreover, the policy behind the provision would be ill-served if parties to such agreements were required to undergo trials on charges of antitrust violations solely because of the hot cargo provision or its intended anticompetitive effects.

There is no question on this record concerning the nature of Sun-Land's antitrust calims. Sun-Land's sole summary judgment submission on those claims states:

> [T]he parties are in complete agreement that the following issues of law and no others are involved in this action[:]
>
> > 2. Whether or not the subcontracting clauses in the collective bargaining agreements . . . are violative of Sections 1 and 2 of the Sherman Act;
> >
> > 3. Whether or not the subcontracting clauses in the collective bargaining agreements . . . fall outside the coverage of the Sherman Act as a result of the labor exemptions from antitrust law.

Sun-Land's evidence of antitrust liability is clearly limited to the subcontracting clauses. The dissent disputes this conclusion and contends that we are "simply wrong" in our summary judgment analysis. It would have us remand to allow Sun-Land to produce additional facts demonstrating anticompetitive intent and conduct. The cross motions for summary judgment were heard in the district court pursuant to the stipulation setting forth the sole issues involved in the action. Having stipulated that no issues of law were involved in the action other than those concerning the subcontracting clause, Sun-Land cannot now seek to raise additional claims.

The nonstatutory exemption from the antitrust laws applies. Thus summary judgment against Sun-Land was proper, and although the district court may not have expressly relied on this rationale, we may affirm on any ground finding support in the record. *Islamic Republic of Iran v. Boeing Co.*, 771 F.2d 1279, 1288 (9th Cir. 1985).

The judgment of the district court is AFFIRMED.

Filed: July 8, 1986 Cathy A. Catterson, Clerk
U.S. Court of Appeals

WIGGINS, Circuit Judge, with whom KENNEDY, ALARCON and BRUNETTI, Circuit Judges, join, dissenting:

Because I disagree with the majority's reasoning on one issue and with its result on a second, I respectfully dissent.

I.

THE CONSTRUCTION INDUSTRY PROVISO

The district court's first ground for granting the defendants' summary judgment[1] was that the subcontracting provision in the defendants' contracts was, standing alone, within the construction industry proviso of section 8(e) *as a matter of law.* (ER 77, 4:14-9:3).[2] Thus, as the case comes to us, we must determine *de novo* whether *the clause alone* suffices to invoke the shelter of the construction industry proviso of section 8(e).

This posture raises an immediate problem: the language of the clause itself is insufficient to answer the question we must determine. Other facts must be know to determine whether the construction industry proviso ap-

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[1]The district court first held that it had jurisdiction over Sun-Land's claims. The defendants do not appeal that ruling.

[2]The "Joint Statement of Uncontroverted Facts and Issues of Law Re Cross-Motions for Summary Judgment" misstates this issue as "Whether or not the subcontracting clauses . . . are violative of Section 1 and 2 of the Sherman Act." (ER 55, 6:14-16) Thus stated, the issue would be a sloppy repetition of the Sherman Act issue stated immediately thereafter (ER 55, 6:17-20). The moving papers and the court's memorandum make clear that this issue involved whether section 8(e) of the NLRA was violated.

plies. For example, what was the purpose of this union in exacting the union-specific clause in the master contract? Did it seek to drive nonunion contractors out of the business market? Did it seek a jurisdictional advantage with a competing union? Was the clause consistent with maintaining or bettering the wages, hours, and working conditions of its members, or did the union have another purpose in mind?

Basic national labor policy, reflected in section 8(e), declares hot cargo agreements to be illegal. The construction industry proviso to section 8(e) is an *exception* to this basic rule. It should thus be interpreted narrowly, so as to reach the Congressional goal in creating it, but to go no further. The legislative history is sparse, making precise determination of Congress's purpose difficult. Generally, however, if the *purpose* of the bargaining parties (usually the union) in insisting on a subcontracting clause is consistent with usual union interests (i.e., the wages, hours, and working conditions of its members), the courts hold that a particular clause falls within the construction industry proviso and thus beyond the general proscription of section 8(e). *See Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 628-31 (1975) (union's hot cargo clause not within section 8(e)'s construction industry proviso because it was not concerned with the legitimate concerns of employees (representation, working alongside nonunion workers) but to pressure nonsignatories into recognition); *cf. Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676, (1965) (finding a marketing hours limitation contained in a multiemployer contract exempt from antitrust liability because its purpose was to protect the wages, hours, and working conditions of the union's members); *United Mine Workers v. Pennington*, 381 U.S. 657, 665-67 (1965) (holding that contract provision not exempt from antitrust

scrutiny merely because arrived at in collecting bargaining context and dealing on its face with wages if true purpose was to curtail competition in the marketplace).

A party to a contract should not be able to insulate itself from an examination of the purpose of its contract provisions simply by adopting certain "approved" language. This is especially true where, as here, the provision has an adverse effect on a nonparty. One party to the contract may negotiate for language in a contract that is in lawful form but that is intended to achieve an unlawful object. The other contracting party may accept such language because it does not adversely affect that party. If an aggrieved *non*party is to have any recourse against the unlawful object, the nonparty must therefore be free to prove the true intent of the parties to the contract, notwithstanding the *facial* conformity of the contract with the law. Moreover, the same contract language may evidence a legal purpose under one circumstance and an illegal purpose in another. The real purpose can therefore be detected only by examination of the circumstances of the specific case.

In the present case, the subcontracting clause is *union specific*. Such a clause may evidence that the union was (a) trying to ensure work for its union members, or (b) trying to freeze an employer out of the market by illegal means. If there is only *one* union, argument (b) is inapplicable, and argument (a) becomes a permissible top-down pressure device to have *nonunion* workers *join the union*. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 662-65 (1982) (concluding that Congress intended to allow whatever top-down pressures for unionization might arise from subcontracting agreements reached in the context of the collective bargaining relationship). If there is more than one union, argument (b) may apply and the clause becomes an improper economic weapon against a

nonsignatory employer affiliated with another union, effectively allowing the first union to prevent such an employer from doing business. *See, e.g., Connell*, 421 U.S. at 624-25 (noting the "significant adverse effects" of allowing unions to exclude certain subcontractors from the market, citing *Pennington* or to create a closed market). Such a direct restraint on the business market might have "substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions." *Id.* at 625. The provision would therefore fall outside the nonstatutory exemption to the antitrust laws. *Id.*

Consequently, under the circumstances of this case, I would not hold that the contract provision falls within the construction industry proviso of section 8(e) as a matter of law. Where, as here, the provision is consistent with the union's intent to accomplish two different purposes, one legal and one illegal, the court must look beyond the mere recitation of previously approved language and determine the parties' actual intent as a matter of fact. That intent is a disputed fact here,[3] and I would remand to the district court to determine it.

II.

THE SHERMAN ACT ISSUE

The district court also granted summary judgment for defendants on the ground that the subcontracting clause in the collective bargaining agreements falls outside the coverage of the Sherman Act *as a result of the labor exemptions from antitrust law.* The district court did *not* hold, as the majority states, "that Sun-Land's claims did

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[3]I am aware that the majority believes there are no disputed facts in this case. For reasons discussed under section II, I disagree.

not raise a triable issue under the Sherman Act." It is this misunderstanding of the posture in which this case reaches us that requires me to dissent on this second issue. I agree with the majority's resolution of the legal issue it defines; I cannot agree with the majoritys' ultimate result in the posture of this case.

The majority properly concludes that agreements that are valid under the labor laws are not thereby automatically exempt from the antitrust laws. As the majority correctly notes, such *per se* exemption is incompatible with the Supreme Court's decision in *Pennington* and its fragmented opinions in *Jewel Tea* and *Connell.* Even if the clause furthers the normal interests of the contracting labor union (and hence is valid under 8(e)), it may adversely affect competition in a manner different in kind or degree from the adverse impact implicit in every collective bargaining contract containing a subcontracting clause.

I also agree that a contract provision *alone* is insufficient to support an antitrust claim *if* that provision is valid under the construction industry proviso to section 8(e). Because of the general use of such hot cargo provisions, a contrary holding could result in widespread antitrust litigation based solely on such provisions, a result clearly not intended by Congress. Although a valid construction industry hot cargo provision may be probative evidence of an antitrust violation, it is not alone sufficient to prove such a violation. Proof of such a violation also requires *other* evidence of anticompetitive intent or conduct, unprotected by labor law.

The preceding analysis *comprehensively* addresses the *only* Sherman Act issue before us on this appeal. We did not take this case en banc, as the majority asserts,

> to determine whether a provision of a collective bargaining agreement falling within the construction industry proviso is, without more, sufficient evidence of an antitrust violation to withstand a summary judgment motion.

Majority opinion at 2.[4] Indeed, we could not have taken the case to determine this issue, because the issue is not raised on this appeal.[5] Sun-Land does not urge that the contract language is sufficient to *create* liability; it merely urges that the contract language is not sufficient to *insulate* the defendants from liability.

To understand the majority's error, it is important to understand the posture of this case. This appeal is from a district court summary judgment based on a resolution of a single antitrust issue. The defendants carefully framed this issue in their summary judgment motion to present a clear-cut legal question: is a subcontracting clause that is valid under the construction industry proviso of section

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[4]I also note that such a generalization is impossible. Different members of the court majority who voted for en banc consideration may have had different reasons for voting to rehear the case. We have no formal mechanism for granting rehearing on specific issues. At most, we may request parties to brief specific issues, and we made no such request in this case. On the contrary, we have *denied* the appellant leave to brief this very issue, on which the majority bases its decision. *See infra.*

[5]The issue was raised below in Sun-Land's cross-motion for summary judgment. Sun-Land in effect argued that the contract language created a rebuttable presumption of antitrust liability as a matter of law, regardless of whether the language was valid under the construction proviso. Because the defendants had failed to present any evidence that the disputed clause was the least restrictive means of accomplishing the defendants' legitimate objectives, Sun-Land argued, Sun-Land was entitled to summary judgment. The district court denied Sun-Land's motion, and that denial is *not* appealed from.

8(e) of the LMRA *automatically* exempt under the Sherman Act? This presented a purely legal question: whether, *regardless of what other anticompetitive intent or conduct Sun-Land alleged or proved,* the validity of the contract provision under section 8(e) was an absolute bar to antitrust liability. A thorough examination of the pleadings below and the district court's memorandum, as evidenced by the citations in the margin, confirms that the issue presented and decided was always regarded by all parties and the court as the pure legal question of whether section 8(e) validity creates a *per se* exemption from the antitrust laws.[6]

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[6]ER 58, 32:7-38:16 (Plaintiff's Memorandum of Points and Authorities In Support of Cross-Motion for Summary Judgment) ("Defendants have adamantly maintained throughout the entire course of this litigation that . . . such restrictions are *ipse dixit* exempt from antitrust scrutiny under the Sherman Act."); ER 58, 38:17-44:2 ("Defendants also theorize that . . . the instant subcontracting restrictions are automatically exempt from antitrust scrutiny under the Sherman Act."); ER 59, 9:19-10:14 (Defendants' Notice of Motion and Motion for Summary Judgment; and Points and Authorities) ("[T]he question this court is asked, is whether the construction industry proviso constitutes an implied exemption to the antitrust laws."); ER 64, 8:21-16:11 (Plaintiff's Reply Memorandum of Points and Authorities in Support of Cross-Motions for Summary Judgment) ("[I]t is clear that the validity of a particular provision of the Labor Act does not *ipse dixit* result in its automatic exemption from antitrust scrutiny under the Sherman Act."); ER 66, 17:1-18:18 (Defendants' Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment) ("The *Jewel Tea* Court could not make more clear that once a restriction falls within the protection of labor law, no more balancing need be done, but that restriction is 'therefore exempt from the Sherman Act,' "); ER 71A, 6:3-9, 6:22-7:13 (Reporter's Transcript) ("[E]ven assuming arguendo these provisions were valid under 8(e), . . . that doesn't determine anyting."); ER 77, 9:5-16:26 (Second Amended Memorandum of Decision and Order) ("Defendants claim that the Sherman antitrust laws cannot be violated when the provision is valid under the NLRA").

The district court granted summary judgment, holding that a contract provision's validity under the construction industry proviso absolutely barred antitrust liability. This summary judgment was in effect a dismissal on the pleadings, as no facts were involved and the decision turned solely on the legal effect of the contract provision. The majority of this court today correctly rejects the district court's analysis, holding instead that a contract provision valid under section 8(e) does *not* insulate contracting parties from antitrust liability *if* there is *additional* anticompetitive intent or conduct. Ordinarily, such a holding by this court would result in reversal and remand to the district court for the determination of this question of fact.

In the present case, however, the majority invokes the well-recognized doctrine that a court of appeals may affirm on any ground finding support in the record, even though the lower court did not rely on that ground. In a single paragraph, the majority decides that Sun-Land's complaint and summary judgment allegations do not allege any anticompetitive intent or conduct beyond the contract language itself and concludes that Sun-Land relies exclusively on the subcontracting clause for its claim of antitrust liability. The majority therefore holds that summary judgment is proper as a matter of law.

Leaving aside the fairness of granting a dismissal on the pleadings without leave to amend based on a new legal standard that the drafter of the complaint had no way of anticipating, the majority's analysis of the case is simply wrong. The complaint below in fact alleged the additional anticompetitive intent and conduct required by the majority's analysis, and Sun-Land continues to press those claims to this day. These allegations are not prominent in the summary judgment materials simply because there was no need for them to be there.

First, the complaint itself is replete with allegations of anticompetitive conduct other than the disputed contract. It alleges anticompetitive agreements other than the disputed contract (ER 1, 5:20-24). It alleges threats and coercion against present and prospective customers of Sun-Land intended to induce them not to do business with Sun-Land, within the terms of the disptued contract or otherwise, as a means of putting Sun-Land out of business (ER 1, 16:15-22). It also alleges threats and coercion against present and prospective customers of Sun-Land intended to induce Sun-Land to recognize the Laborers as its bargaining representative, in violation of the NLRB certification of the present, independent union as bargaining agent (ER 12:7-13:6; 17:3-8). Finally, the complaint alleges an intent to destroy competition or control prices in the commercial landscape industry (ER 1, 17:35). Some of these allegations are admittedly general, but that is hardly surprising in a complaint drafted before discovery.

Neither side offered affidavits supporting or opposing the motions grounded in antitrust.[7] This is logical: because the parties framed defendants' summary judgment motion as a *purely* legal question dependent *solely* on the contract language, any additional facts would have been irrelevant. There was no need for allegations of fact by affidavit at the time the district court granted the summary judgment motion we review here. This court therefore should not rely on the absence of such facts to affirm the summary judgment.

In addition, the summary judgment motion was heard on facts stipulated *only for the purpose of the cross motions for summary judgments.* This is apparent from the very

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[7]The only declaration filed in relation to the motions at all was on the issue of jurisdiction, which is not on appeal here.

caption of the stipulation: "Joint Statement of Uncontroverted Facts and Issues of Law *Re Cross Motions for Summary Judgment*" (ER 55 (emphasis added)). The statement contained only the facts necessary to resolve the purely legal issues presented. Even in this stipulation, however, Sun-Land included facts that suggest additional anticompetitive conduct and intent on the part of the defendants. The statement notes the Teamsters' earlier association with Sun-Land and its employees, the Teamsters' abrupt disclaimer of that association, and the ensuing court action that resulted in the finding of unfair labor practice on the Teamsters' part. ER 55, 4:22-6:6; *see also Toyota Landscape Co. v. Building Material & Dump Truck Drivers Local No 420,* 726 F.2d 525 (resolving the court action), *cert. denied,* 105 S. Ct. 104 (1984). The defendants objected to the inclusion of these facts as irrelevant (ER 55, 6:7-8), as indeed they were to the ground on which the district court granted defendants' motion, the *automatic* antitrust exemption. The facts are certainly relevant, however, to the campaign of anticompetitive conduct on the part of local contractors and labor unions that Sun-Land alleges in its complaint. On their face, these facts suggest earlier, illegal anticompetitive actions against Sun-Land. In any event, they are certainly inconsistent with the majority's conclusion that Sun-Land relies solely on the hot cargo language for antitrust liability.

Moreover, Sun-Land's memoranda in the district court make clear that Sun-Land recognized the possibility of disputed facts should the court deny the motions for summary judgment. Indeed, Sun-Land's own cross-motion for summary judgment is grounded on the defendants' failure to present any evidence that the subcontracting provision was the " 'least restrictive means to obtain legitimate union goals.' " (ER 64, 16:12-22:23 (quoting *Pennington*)). Sun-Land argued that in

light of this failure and the unique circumstances of the case, the subcontracting agreement was as a matter of law not the least restrictive means, entitling Sun-Land to summary judgment. Although Sun-Land's cross-motion was denied and not appealed, its arguments in support of that cross-motion clearly indicate that Sun-Land had additional evidence to prove anticompetitiveness[8] and did not offer it merely because *both summary judgment motions presented pure questions of law* and the evidence was therefore irrelevant to them. Even the district court's memorandum implicitly recognized this aspect of Sun-Land's position. *See* ER 77, 9:5-16:26 ("Sun-Land claims that regardless of validity of the clause under the NLRA, the Court must engage in an independent analysis of the antitrust consequences.").

I do not normally take exception to the practice of affirming district court judgments on grounds different from those relied on by the district court. This practice serves both judicial economy and the parties' interests. Such an affirmance is justified, however, only "if the issue was litigated in the trial court, and if the record presented is such as to permit decision." *M.O.S. Corp. v. John I. Haas Co.*, 375 F.2d 614, 617 (9th Cir. 1967). In the present case, neither the parties, the district court, nor the three-judge panel of this court considered the suffi-

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[8]For example, Sun-Land points out that its wages, hours, and working conditions were the same for the new union as they had been when its employees were represented by the Teamsters, suggesting that the subcontracting clause was not related to the legitimate union goals of improving employees' wages, hours, and working conditions. *See, e.g., Donald Schriver, Inc. v. NLRB,* 635 F.2d 859, 880 (D.C. Cir. 1980) ("The only way that workers in the employment pool may be certain to receive the protection and benefits provided by the master contract is if subcontracting is limited to subcontractors who are signatory to that agreement *or who provide identical terms.*" (emphasis added)), *cert. denied,* 451 U.S. 976 (1981).

ciency of the complaint under the antitrust standard the majority sets forth today, nor did any of them consider the presence or absence of disputed facts material to the application of that standard. The first time such concerns were raised was at oral argument before the *en banc* panel of this court. The raising of the issue prompted the following comments in a letter to the court from Sun-Land's counsel:

> With respect ot the comments and inquiries . . . as to the sufficiency of certain allegations in the Complaint and whether the Complaint had withstood the summary judgment motion, I would respectfully request that the parties be given an opportunity to submit supplemental briefs on this issue. The sufficiency of Plaintiff's Complaint was *never* challenged by the Defendants before the District Court or the 3-Judge Panel of this Court, nor was it raised by either of these tribunals. The comments of the En Banc Panel represent the *first* occasion that the sufficiency of the allegations of Plaintiff's Complaint were challenged or placed in issue. Since this question has never been briefed by the parties and came as a complete surprise to me, I would urge the Court to allow the parties to submit supplemental briefs addressed to the issue of whether the allegations of the Complaint are sufficient to plead a *prima facie* violation of the Sherman Act and withstand a motion for summary judgment on the affirmative defense, that regardless of what is alleged, the challenged conduct is *automatically* and *absolutely* exempt from antitrust scrutiny *solely* because the restraint is contained within a collective bargaining agreement arguably privileged by the construction industry proviso to Section 8(e). Because this issue has not been heretofore raised or addressed, additional briefing may be necessary. (Emphasis in original).

We denied this request by Sun-Land, which merely asks that it be allowed to address at least once the issue that forms the basis for the majority's decision against it.

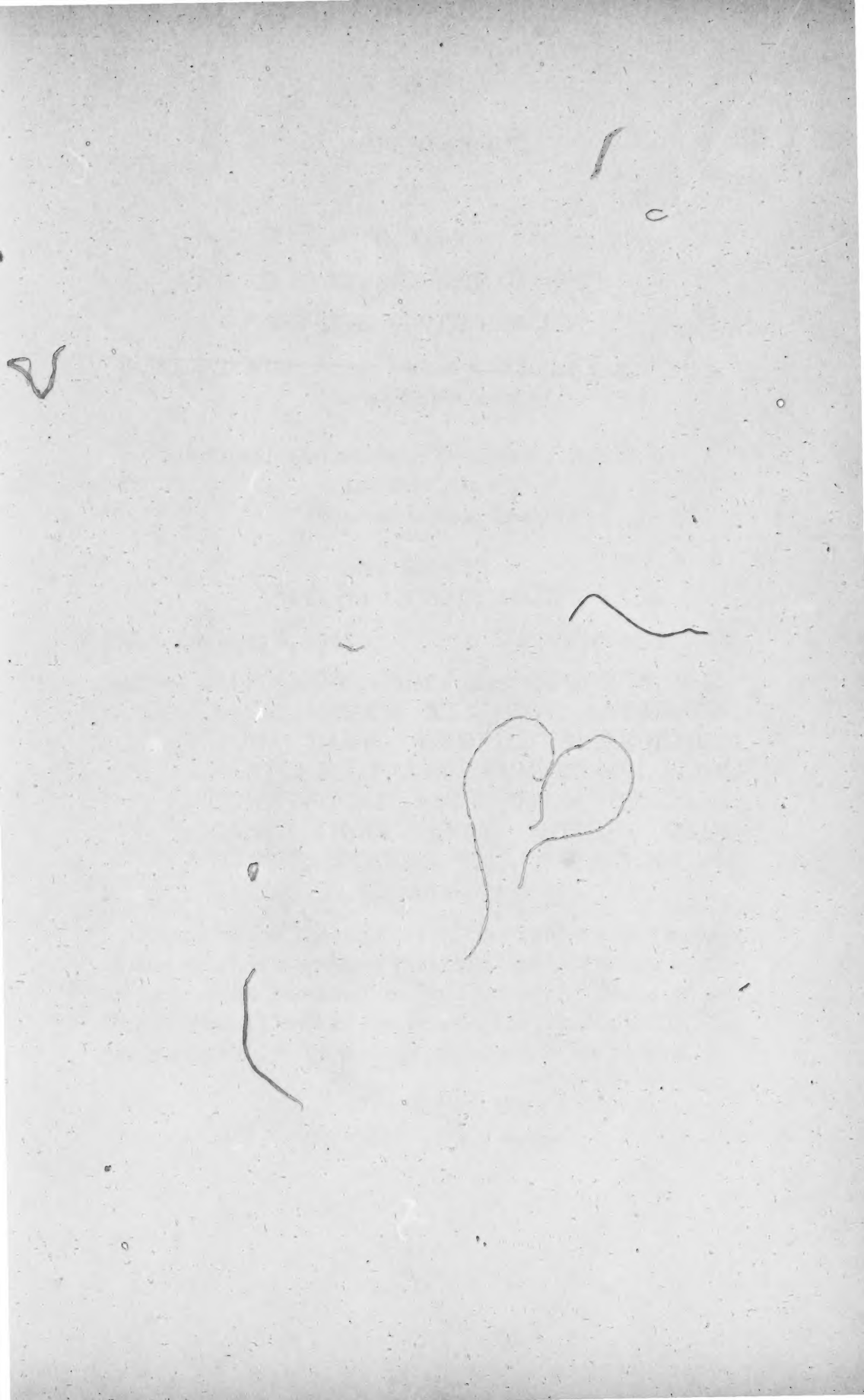
In light of the fact that the issues of sufficiency of the complaint and the existence of material issues of disputed fact were not addressed by the court below, have never been argued by the parties, and are unreachable in the present posture of this case, I believe the majority errs in deciding the case on those grounds.

Accordingly, I dissent.

Filed: July 8, 1986 Cathy A. Catterson, Clerk
U.S. Court of Appeals

BROWNING, Chief Judge, concurring and dissenting:

I concur in the majority opinion except in its treatment of the parties' stipulation. Because I agree with the dissent that the stipulation was meant only to specify the issues appropriate for summary judgment, and not to foreclose the parties from pursuing other legal theories if both summary judgment motions were denied, I would remand for further proceedings.



APPENDIX B

ORDER

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SUN-LAND NURSERIES, INC., a California corporation,
Plaintiff-Appellant,
v.
SOUTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS, et al.,
Defendants-Appellees.

No. 85-6029
D.C. No. CV 83-1211RJK

Filed: January 9, 1986 Clerk, U.S. Court of Appeals

Before: BROWNING, Chief Judge, GOODWIN, WALLACE, SNEED, KENNEDY, ANDERSON, HUG, TANG, SKOPIL, SCHROEDER, FLETCHER, FARRIS, PREGERSON, ALARCON, POOLE, FERGUSON, NELSON, CANBY, BOOCHEVER, NORRIS, REINHARDT, BEEZER, HALL, WIGGINS and BRUNETTI, Circuit Judges.

Upon a vote of the majority of the regular active judges of this court, it is ordered that this case be reheard by the en banc court pursuant to Rule 25 of the Rules of the United States Court of Appeals for the Ninth Circuit. The previous three-judge panel assignment is withdrawn.

JAMES M. BROWNING
Chief Judge

APPENDIX C

OPINION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SUN-LAND NURSERIES, INC., a California corporation,
Plaintiff-Appellant,
vs.
SOUTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Central District of California

Robert J. Kelleher, District Judge, Presiding

Argued June 7, 1985; Submitted July 8, 1985

Los Angeles, California

No. 85-6029
D.C. No. CV 83-1211 RJK

Filed: August 27, 1985 Clerk, U.S. Court of Appeals

Before: WALLACE, TANG and WIGGINS, Circuit Judges.

WALLACE, Circuit Judge:

Sun-Land Nurseries, Inc. (Sun-Land) appeals from the district court's judgment that certain hot cargo agreements fall within the construction industry proviso to section 8(e) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(e), and that therefore those agreements are automatically exempt from antitrust scrutiny under sections 1 and 2 of the Sherman Act, 15 U.S.C.

§§ 1, 2. We have jurisdiction under 28 U.S.C. § 1291. We affirm in part, reverse in part, and remand.

I

Sun-Land is a landscaping company to which general contractors may subcontract work on major construction projects. The present dispute arose after the Teamsters Local 420 (Teamsters) terminated its representation of Sun-Land's employees either because of an internal power struggle or in the hope of improving its relations with the Southern California District Council of Laborers (Laborers). *Toyota Landscape Co. v. Building Material & Dump Truck Drivers Local No. 420,* 726 F.2d 525, 527, 529 (9th Cir.), *cert. denied,* 105 S. Ct. 104 (1984) (*Toyota*). Sun-Land brought suit against the Teamsters, and we ultimately held that the termination constituted a violation of the collective bargaining agreement between the Teamsters and Sun-Land. *Id.* at 529. In the meantime, however, Sun-Land's employees elected the Independent Union of Craftsmen (Independent Union) as their new bargaining representative.

Unfortunately for Sun-Land, many of the general contractors in the area in which it does business are parties to various multi-employer agreements that prohibit the subcontracting of work to any employer that does not have a current bargaining agreement with the Laborers or one of the basic craft unions specifically named in the agreements (the Major Unions). Sun-Land claims that, as a result of these subcontracting limitation clauses and its lack of affiliation with either the Laborers or any of the Major Unions, its business suffered drastically. It therefore brought suit against the Laborers arguing that the subcontracting clauses constitute both an unfair labor practice under section 8(e) of the NLRA, 29 U.S.C.

§ 158(e), and an unreasonable restraint on trade under sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.

The district court granted summary judgment in favor of the Laborers, holding that under the construction industry proviso, the challenged clauses are exempt from section 8(e)'s prohibition against hot cargo agreements and that therefore they are automatically exempt from Sherman Act scrutiny. The district judge rejected Sun-Land's attempts to distinguish *Woelke & Romero Framing, Inc. v. NLRB,* 456 U.S. 645 (1982) (*Woelke*), and reasoned that *Woelke* compelled his section 8(e) holding. The district judge relied on *Suburban Tile Center v. Rockford Building Trades Council,* 354 F.2d 1, 3 (7th Cir.), *cert. denied,* 384 U.S. 960 (1966) (*Suburban Tile Center v. Rockford Building Trades Council,* 354 F.2d 1, 3 (7th Cir.), *cert. denied,* 384 U.S. 960 (1966) (*Suburban Tile*), for his holding on the labor antitrust exemption. He reasoned that we implicitly adopted *Suburban Tile's* automatic exemption holding in *Brogan v. Swanson Painting Co.,* 682 F.2d 807 (9th Cir. 1982) (*Brogan*), by completely ignoring an antitrust claim after finding that a clause in a collective bargaining agreement did not violate the labor laws. The district court concluded that *Brogan* amounted to an implicit rejection of the balancing approach to the labor antitrust exemption advanced in *Ackerman-Chillingsworth v. Pacific Electrical Contractors Association,* 579 F.2d 484, 501-04 (9th Cir. 1978) (Hufstedler, J., concurring in part and dissenting in part), *cert. denied,* 439 U.S. 1089 (1979). Finally, the district court concluded that its automatic exemption holding was not inconsistent with *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100,* 421 U.S. 616 (1975) (*Connell*), or *United Mine Workers v. Pennington,* 381 U.S. 657 (1965) (*Pennington*).

We dismissed the initial appeal in this case for lack of subject matter jurisdiction on the ground that there was no final order or judgment. The parties then obtained a final judgment, however, and filed a new notice of appeal. We now review the merits.

II

The parties raise a narrow issue: whether the subcontracting limitation clauses involved here fall within the construction industry proviso to section 8(e). There are no factual issues in dispute. Nor do the parties dispute that the clauses fall within the general prohibition of section 8(e).[1] They also agree that the clauses would be sheltered for section 8(e) liability by a literal reading of the construction industry proviso.[2] The disagreement is over whether the clauses are sheltered by the construction industry proviso in light of legislative history. The ques-

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[1]Section 8(e) of the NLRA provides in part:

> (e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void. . . .

29 U.S.C. § 158(e).

[2]The construction industry proviso to section 8(e) states:

> *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work[.]

29 U.S.C. § 158(e).

tion is thus reviewable de novo. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 105 S. Ct. 101 (1984) (*McConney*).

The question here is the same general one that was presented to the Supreme Court in *Connell* and *Woelke*. In *Connell*, the Court decided that, despite the proviso's literal language, it does not apply to agreements obtained outside the context of collective bargaining because Congress did not intend to authorize such agreements. 421 U.S. at 633. Within the collective bargaining arena, however, a unanimous Court in *Woelke* held "that the construction industry proviso to § 8(e) . . . ordinarily shelters union signatory subcontracting clauses," 456 U.S. at 666 (emphasis added), and upheld certain clauses even though they were not "limited in application to particular jobsites at which both union and nonunion workers are employed." *Id.*

The Court has held that the construction industry proviso is not to be interpreted literally, but "must be interpreted in light of the statutory setting and the circumstances surrounding its enactment." *Id.* at 653, quoting *Connell*, 421 U.S. at 628. This rule is a variation on a general rule of statutory construction: unambiguous statutory language is conclusive "in the absence of 'a clearly expressed legislative intent to the contrary.'" *United States v. Turkette*, 452 U.S. 576, 580 (1981), *quoting Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 103, 108 (1980). Instead of being conclusive, the proviso's language may be given only to the effect Congress clearly intended it to be given. *See Woelke*, 456 U.S. at 654. This modification of the general rule is justified because the proviso is an exception to the general prohibition against hot cargo agreements. *See generally* Easterbrook, *The Supreme Court, 1983 Term — Forward: The Court and the Economic System*, 98 Harv. L. Rev. 4,

14-18, 42-58 (1984). The general prohibition was enacted to overrule *Local 1976, United Brotherhood of Carpenters & Joiners v. NLRB,* 357 U.S. 93 (1958), in which the Court indicated that employers and unions were free to enter into hot cargo agreements designed to boycott non-union products or services, *id.* at 108. *Woelke,* 456 U.S. at 654-55.

In *Woelke,* the Court rejected a nonunion employer's contention that the proviso should not apply to construction industry hot cargo agreements unless they are limited to construction projects where union and nonunion workers are both employed. *Id.* at 654. The employer argued that Congress intended the proviso to permit "only those subcontracting agreements that are designed to reduce friction at particular jobsites," *id.* 661, and intended the general prohibition to "restrict the ability of unions to engage in top-down organizing." *Id.* at 663. The Court rejected the job friction argument as a misreading of congressional intent and reasoned that Congress accepted as tolerable in the construction industry "whatever top-down pressure such clauses might entail." *Id.* The Court concluded from its own examination of the legislative history that "Congress 'wished to preserve the *status quo'* regarding agreements between unions and contractors in the construction industry." *Id.* at 657 (emphasis in original), *quoting National Woodwork Manufacturing Association v. NLRB,* 386 U.S. 612, 637 (1967). Thus, whether a particular clause is within the scope of the proviso is determined "by examining Congress' perceptions regarding the status quo in the construction industry." *Id.*

With respect to the agreements being challenged in *Woelke,* the court concluded that "Congress believed that broad subcontracting clauses similar to those at issue . . . were part of the pattern of collective bargaining prior to

1959, and that the Board and the courts had found them to be lawful." *Id.* at 660. In addition, the Court found Congress' perceptions to be accurate and found no evidence to support the narrow construction urged by the petitioners. *Id.* at 660-61. Thus, it held that exemption of the particular clauses involved "is fully consistent with the legislative history of § 8(e) and the construction industry proviso." *Id.* at 660.

Sun-Land argues that the proviso should not be interpreted to cover the particular clauses involved in this case, however, because these clauses operate to exclude "other-union" labor rather than nonunion labor. Although *Woelke* did not specifically address this proposed limitation on the scope of the proviso, the same analytical framework applies. We must decide whether Congress perceived the status quo in 1959 as allowing the agreements challenged here.

Congressional perceptions concerning the permissibility of agreements like those involved in this case are difficult to ascertain because the legislative history contains only one reference to the problem. Representatives of an employer and an independent labor union argued before the House Labor Committee that all hot cargo agreements should be banned because otherwise they could result in "other-union" employers being denied the opportunity to compete for construction jobs. *Labor-Management Reform Legislation: Hearing on H.R. 3540, H.R. 3302, H.R. 4473, and H.R. 4474 before a Joint Subcommittee of the House Committee on Education and Labor*, 86th Cong., 1st Sess. 2363, 2365-66 (1959) (remarks of Howard Lane and Edward M. Carlton), *cited in Woelke*, 456 U.S. at 658. The House proposal would have made it an unfair labor practice for any labor organization and any employer to enter into a hot cargo agreement. H.R. 8400, § 705(b)(1), 86th Cong., 1st Sess. 65 (1959), *reprinted in*

1 NLRB, *Legislative History of the Labor Management Reporting and Disclosure Act of 1959* 683 (1959) (hereinafter cited as *Legislative History*). The Senate proposal would have outlawed such agreements only in the trucking industry. 105 Cong. Rec. 5887-88 (1959), *reprinted in* 2 *Legislative History, supra*, at 1161-62 (remarks of Senators Gore and Kennedy). The Conference Committee nominally adopted the House version, but later inserted the construction industry proviso despite the arguments about "other-union" employers made before the House Labor Committee. Conf. Rep. No. 1147, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. Code Cong. & Ad. News 2503, 2511-12. Although the legislative history is scant, what little exists indicates that Congress considered the specific problem involved here and concluded that the desirability of maintaining the status quo in the construction industry outweighed any unfairness to "other-union" employers and their employees. We must give full and fair effect to Congress' intent. Thus, we agree with the district court and interpret the construction industry proviso to cover the agreements before us.

III

We next consider whether these agreements are automatically exempt from antitrust scrutiny. The Supreme Court has recognized two forms of labor exemptions from the antitrust laws: statutory and nonstatutory. The statutory exemption applies whenever a union acts in its self-interest and does not combine with nonlabor groups. *See Connell*, 421 U.S. at 621-22; *United States v. Hutcheson*, 312 U.S. 219, 232 (1941). Such an exemption is not available in this case because the Laborers combined with nonlabor groups through the collective bargaining agreements. Thus, whether the parties' conduct is exempt from antitrust scrutiny depends on whether the agreements

qualify for the "limited nonstatutory exemption." *Connell*, 421 U.S. at 611; *see also Local 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676, 689 (1965) (*Jewel Tea*); *Pennington*, 381 U.S. at 661-66.

The nonstatutory exemption derives from the accommodation that must be made "between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets." *Connell*, 421 U.S. at 622; *see also Jewel Tea*, 381 U.S. at 689; *Pennington*, 381 U.S. at 664-65. It permits restraints on competition in the labor market, despite an effect on price competition in the commercial market, unless the activity "contravenes antitrust policies to a degree not justified by national labor policies." *Connell*, 421 U.S. at 625. The test searches for potential restraints on commercial competition. In *Connell*, the Court held that a particular hot cargo agreement that violated section 8(e) did not fall within the nonstatutory exemption because the "union and nonlabor party [had agreed] to restrain competition in a business market." *Id.* at 622-23. The Court rejected the argument that the secondary boycott remedies under the labor laws precluded application of antitrust remedies. *Id.* at 633-34.

The issue in this case is not whether these hot cargo agreements fall within the nonstatutory exemption, but whether they *automatically* fall within the exemption because they are acceptable under the construction industry proviso to section 8(e). The district court answered this question in the affirmative. We disagree because the secondary boycott prohibitions of section 8(e) and the antitrust laws do not have identical objectives. *See Pennington*, 381 U.S. at 664. The secondary boycott laws seek to eliminate unfair coercion on primary and secondary employers, and needless injury to the public. In contrast, the antitrust laws seek to encourage economic efficiencies

by fostering reliance on the competitive process. Thus, even conduct that the labor statutes permit, in a proper case, may subject the parties to antitrust liability. For example, if hot cargo agreements like those in this case were used to enforce a cartel's product market allocation plan, they would be unlawful under the antitrust laws regardless of labor policy.

We reverse the district court's automatic exemption holding and remand for its initial determination of whether the nonstatutory exemption applies in this case under the proper approach by balancing labor and antitrust policies. *See Connell,* 421 U.S. at 622; *Jewel Tea,* 381 U.S. at 689; *Pennington,* 381 U.S. at 664-65. On remand, the district court must determine whether the agreements create such potential restraints on the business market that they "would not follow naturally from the elimination of competition over wages and working conditions," *Connell,* 421 U.S. at 625, but instead evidence that the "union and a nonlabor party [have agreed] to restrain competition in a business market." *Id.* at 622-23, *citing Allen Bradley Co. v. Electrical Workers,* 325 U.S. 797, 806-11 (1945). *See also Pennington,* 381 U.S. at 663-66. Even if the agreements merely restrain competition in the product market as a natural consequence of eliminating competition in the labor market, the nonstatutory exemption applies only to the extent that the agreements are the least restrictive means of accomplishing the legitimate labor goals. *See Jewel Tea,* 381 U.S. at 692-93.

Neither *Brogan,* 682 F.2d 807, nor *Suburban Tile,* 354 F.2d 1, compels a different result. The district court interpreted *Brogan* as implicity adopting the automatic exemption rule because there we remanded a case involving an antitrust claim without addressing it after finding that a subcontracting clause did not violate the labor laws. Indeed, after reversing the adverse labor law ruling,

we simply remanded "for further consideration of the trustees' claim." *Brogan,* 682 F.2d at 811. But this hardly compels the conclusion that *Brogan* adopted the suggested automatic rule. It would be inappropriate for us to speculate how the antitrust claim was resolved when the opinion does not discuss it. If in *Brogan* we found the nonstatutory exemption to apply, we may well have done so based on a balancing analysis rather than by a rule of automatic exclusion. Indeed, our court may have remanded the case to the district court without mentioning the antitrust claim because we expected the district court to reconsider the antitrust claim in light of its labor law reversal. Thus, *Brogan* cannot be dispositive of this issue.

Suburban Tile cannot assist us because it did not survive *Pennington.* Even if it did, however, a decision by the Seventh Circuit does not bind us, and we would reject its rule as inappropriate.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

APPENDIX D

SECOND AMENDED MEMORANDUM OF DECISION AND ORDER

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

SUN-LAND NURSERIES, INC., a California corporation,
Plaintiff,

v.

SOUTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS; AFFILIATED LABORERS LOCAL UNION 300; AFFILIATED LABORERS LOCAL UNION 652; and AFFILIATED LABORERS LOCAL UNION 1082,
Defendants.

No. CV 83-1211-RJK (Kx)

Filed: November 19, 1984 Clerk, U.S. District Court
Central District of California

Entered: November 20, 1984 Clerk, U.S. District Court
Central District Of California

The Court presently has before it plaintiff's and defendants' motions for summary judgment. Said motions came on regularly for hearing on April 30, 1984. Having granted defendants' motion and denied plaintiff's motion, the Court makes the following findings of fact and conclusions of law.

This action was filed by plaintiff Sun-Land Nurseries ("Sun-Land") against defendant Southern California District Council of Laborers, Affiliated Laborers Local

Union 300, Affiliated Laborers Local Union 652 and Affiliated Laborers Local Union 1082 ("defendants"), alleging violations of the National Labor Relations Act, 29 U.S.C. § 158 ("NLRA"), and the Sherman Antitrust Act, 15 U.S.C. § 2, *et. seq.* ("Sherman Act"). The complaint also seeks declaratory and injunctive relief.

Sun-Land is a landscaping contractor which subcontracts with general contractors on major construction projects. The dispute between the parties arose after the Teamsters Local 420 ended their collective bargaining relationship with Sun-Land's employees. Sun-Land brought suit against Teamsters Local 420 and Judge Kenyon of this Court held that the termination of the relationship between the Teamsters Local 420 and Sun-Land's employees did not constitute a violation of the collective bargaining agreement between the parties. Shortly thereafter, Sun-Land's employees decided to form another union; a union independent of the defendants. The National Labor Relations Board informed defendant Affiliated Laborers Local 652 of the union certification of Sun-Land's employees in the event Local 652 wanted to proceed as an intervenor in the certification process. Local 652 declined to intervene. Sun-Land's employees then certified the Independent Union of Craftsmen as their bargaining representative.

Many of the general contractors in the Southern California area are parties to the Southern California Master Labor Agreement or the Short Form Agreement. A clause in the agreements prohibits general contractors from subcontracting work to any employer that is non-union. As a result of the termination of the union agreement between Teamsters Local 420 and Sun-Land's employees, Sun-Land is now considered to be "non-union." Consequently, Sun-Land claims that its business has become non-existent because the general contractors will no

longer subcontract any work to it as a result of the subcontracting limitation clause in the Master and Short Form Agreements.

Sun-Land brought this suit alleging that the subcontracting limitation clause constitutes an unfair labor practice in violation of the NLRA. It also alleges that the limitation on subcontracting in the landscaping industry constitutes a conspiracy to prevent competition and hence is violative of the Sherman Act.

A. Jurisdiction to consider Sun-Land's antitrust claims

Sun-Land and defendants disputes whether this Court has jurisdiction to consider the antitrust claim.[1] For there to be an antitrust violation, there must be a nexus between the acts complained of and interstate commerce. This nexus is jurisdictional in nature, *Bernardinelli v. Castle & Cooke, Inc.,* 587 F.2d 37, 38 (9th Cir. 1978), and can be established under either an "affecting commerce" or an "in commerce" theory. *Las Vegas Merchants Plumbers Ass'n v. United States,* 210 F.2d 732, 739 n. 3 (9th Cir. 1953), *cert. denied,* 348 U.S. 817, 75 S.Ct. 29, *reh'g denied,* 348 U.S. 889, 75 S.Ct. 202 (1954). On the record here, it does not appear that Sun-Land qualifies under the "in commerce" test. It is sufficient under the "affecting commerce" theory if the alleged restraint affects the purchases of out-of-state materials, products or equipment used in plaintiff's business even though the business itself is purely intrastate. *Hospital Building Co. v. Trustees of Rex Hospital,* 425 U.S. 738, 744-746, 96 S.Ct. 1848, 1852-53, 48 L.Ed.2d 338 (1976); *Burke v. Ford,* 389 U.S.

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[1]The parties only dispute whether this Court has subject matter jurisdiction over the antitrust claim. Subject matter jurisdiction over the entire action is based upon the Federal Declaratory Judgment Act, 28 U.S.C. § 2201-02, Section 303 of the Labor Management Relations Act, 29 U.S.C. § 187, *et seq.* and 28 U.S.C. §§ 1331, 1337.

320, 3212-22, 88 S.Ct. 443, 444, 19 L.Ed.2d 554 (1967); *Community Builders, Inc. v. City of Phoenix,* 652 F.2d 823, 827 (9th Cir. 1981). It does appear that Sun-Land purchases a substantial quantity of its materials from out-of-state suppliers and that these purchases have decreased due to the subcontracting limitation clause in the Master and Short Form Agreements. This is sufficient to invoke the protection of the antitrust laws and the jurisdiction of this Court. *See Hospital Building,* 425 U.S. at 744-46, 96 S.Ct. at 1852, *Community Builders, Inc.,* 625 F.2d at 827.

B. The subcontracting limitation clause and section 8(e) of the NLRA:

Section 8(e) of the NLRA provides:

> It shall be unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains . . . from . . . doing business with any other person . . . *PROVIDED that nothing in this subsection shall apply to an agreement between an employer an a labor organization in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction. . .*

29 U.S.C. § 158(e) (emphasis added). The parties do not dispute that the Master and the Short Form Agreements are between an employer and a labor organization or that the work was to be one at a construction site. The parties do dispute whether the recent Supreme Court case of *Woelke & Romero Framing, Inc. v. NLRB,* U.S. ____, 102 S.Ct. 2071, ____ L.Ed.2d ____ (1982) applies to bar plaintiff's NLRA claim.

In *Woelke,* the court was faced with a subcontracting limitation clause almost identical to the one at issue here.[2] The clause provided:

> The contractor agrees that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the site of construction, alteration, painting or repair of a building, structure or other work . . . except to a person, firm or corporation, party to an appropriate current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement.

____ U.S. at ____, 102 S.Ct. at 2074 n. 1. In holding that this clause does not violate the NLRA because of the exception contained in section 8(e), the Court said:

> We hold that the construction industry proviso to § 8(e) of the [NLRA] . . . ordinarily shelters union signatory subcontracting clauses that are sought or negotiated in the context of a collective bargaining relationship.
>
> . . .

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[2]The Master Agreement and the Short Form Agreement provide: The Contractor agrees that he or his Subcontractor shall employ one or more employees who are represented by the Union, on each jobsite on which he or any Subcontractor on the jobsite is performing work of the type covered by this Agreement, . . . and that *neither the Contractor nor any Subcontractor on the jobsite will subcontract any work to be done at the site of construction, alteration, painting or repair of a building, structure or other work, except to a person, firm or corporation, party to a current labor agreement with the Union,* or the basic crafts; namely, the Carpenters, Cement Masons, Operating Engineers and Teamsters who are also party to an agreement covering the particular work generally recognized as the jurisdiction defined by the Building and Construction Trades Department.

Id. at ____, 102 S.Ct. at 2083. Despite the clear holding of the Supreme Court in *Woelke*, Sun-Land claims that *Woelke* is distinguishable.

Sun-land argues that the Court in *Woelke* considered three factors crucial in holding that the clause in question there did not violate section 8(e) of the NLRA. Sun-Land argues that the *Woelke* holding concerned only subcontracting clauses which seek to exclude non-union as opposed to other union workers. Sun-Land claims it is *not* non-union; its employees formed their own union. Therefore, Sun-Land argues that the *Woelke* holding does not apply. This argument involves an incorrect reading of the *Woelke* case. In *Woelke*, the Court noted that the legislative history of section 8(e) shows that Congress was aware that the limitation clauses could be used to exclude independent unions as well as non-union employers. The Court said:

> The House Labor Committee heard similar testimony. Representatives of an *independent union* complained that employers and unions could lawfully enter into subcontracting clauses and that as a result, *employers whose employees had selected another union were denied an opportunity to compete for construction jobs.* They described agreements very similar to those at issue here.
>
> In any event, Congress' belief that subcontracting agreements were common and lawful was accurate.

____ U.S. at ____, 102 S.Ct. at 2079 (emphasis added). In addition, the clause specifically upheld in *Woelke* contained a restriction that the subcontractor must have a current agreement with *the Union or one of the signatory unions,* not with *ANY* union as Sun-Land would claim. In this respect, the clause here is identical to the clause in *Woelke.* Therefore, Sun-Land's argument must fail.

Sun-Land also argues that the *Woelke* Court considered it important that there would be only one union representing the employees in a trade such that the conflict for work would always be between union and non-union employees and not between signatory union and other union employees. The Court did indicate that:

> It may be true, as petitioners emphasize, that the use of union signatory subcontracting clauses will give a particular union a monopoly position in a labor market. However, the Board has previously noted that in most labor markets, apart from some minor overlaps, there is only one union representing a particular craft. . . .

Id. at 2082 n. 15. Sun-Land claims that here more than one union represents landscaping employees thereby giving the defendant unions a monopoly position. The Court in *Woelke* reasoned, however, that the number of situations in which more than one union represented employees in any trade would not be significant enough to invalidate these clauses. Sun-Land's argument has been before the Court and it upheld the limitation nonetheless. Hence, Sun-Land cannot use this argument to distinguish *Woelke.*

Finally, Sun-Land attempts to distinguish *Woelke* on the ground that it was important to the Corut that a non-union or independent union employer could arrange a pre-hire agreement allowing the employer to switch from non-union to union status for a single job. This prevents a subcontractor from being completely shut out of the job market due to its non-union status. Sun-Land claims that it cannot enter into a pre-hire agreement with the Laborers' unions, thereby avoiding the subcontracting limitation clause, because its employees have certified another union as their bargaining representative. Unlike the employer in *Woelke,* Sun-Land is being entirely foreclosed

from construction contracts because of the subcontracting limitation clause, Any separate agreement with the Laborers' unions at this time would be a violation of the agreement with the current representative of Sun-Land's employees. *See NLRB v. Stockton Door,* 547 F.2d 489, 490 (9th Cir. 1976). The Court in *Woelke* did not address this specific problem. The Court did note that the clause it upheld would foreclose independent union employers from construction projects where the general contractor was a party to an agreement containing one of these clauses. The Court upheld the clause nonetheless. Since this is the exact situation that Sun-Land now finds itself in, the Court's holding in *Woelke* appears to validate the subcontracting limitation clause in this case.

Hence, *Woelke* forecloses plaintiff's cause of action for violation of section 8(e) of the NLRA. Accordingly, defendants' motion for summary judgment on the first cause of action for violation of the NLRA is granted and the plaintiff's motion on the same cause is denied.

C. The subcontracting limitation clause and the Sherman Act:

The defendants argue that once this Court has determined that the limitation clause is not violative of the NLRA, then as a matter of law, it cannot be violative of the Sherman Act, 15 U.S.C. § 2, *et seq.* This is the point where Sun-Land and defendants most pointedly disagree on the law. Defendants claim that the Sherman antitrust laws cannot be violated when the provision is valid under the NLRA; Sun-Land claims that regardless of validity of the clause under the NLRA, the Court must engage in an independent analysis of the antitrust consequences.

In support of their motion, defendants argue that numerous courts, including the Ninth Circuit, have taken the position that once a subcontracting limitation clause

is found to be valid under section 8(e) of the NLRA, it is also exempt from antitrust scrutiny. In *Brogan v. Swanson Painting Co.,* 682 F.2d 807 (9th Cir. 1982), the Ninth Circuit reversed the lower court's judgment in favor of defendant on defendant's NLRA and antitrust defenses. The parties entered into an agreement containing a subcontracting limitation clause. The agreement provided that the contractor would be required to make employee contributions for any work subcontracted out to non-union subcontractors. The defendant argued that this limitation on subcontracting violated the NLRA and the Sherman Act. The lower court agreed but the Ninth Circuit reversed on appeal. The Ninth Circuit stated that it must decide whether the subcontracting clause in question violated the NLRA *or* the antitrust laws. It first found that the clause did not violate section 8(e) relying on the holding of *Woelke. Id.* at 808-09. The Court then remanded the case *completely ignoring the antitrust defense also raised by defendant.* Thus, the court appears to have taken the position that once a clause is found to be valid under *Woelke*, there is no antitrust challenge to the clause. The court reversed judgment for defendant on the antitrust defense once it found the clause to be valid under the NLRA.

Sun-Land argues that the *Brogan* court did not *hold* that an exemption under the NLRA is equivalent to an exemption under the antitrust laws. In addition, plaintiff claims that *Brogan* is distinguishable because it involved a non-union contractor, not an independent union contractor. As noted, this non-union versus other union distinction was before the Supreme Court in *Woelke* and the Court found this distinction to be unimportant in upholding the subcontracting limitation clause. Furthermore, though the court in *Brogan* did not expressly hold that an exemption under the NLRA is equivalent to an exemption under the antitrust laws, it did reverse the

lower court's judgment for defendant on the antitrust defense *without discussion.* This is at least an indication that the Ninth Circuit views a clause as exempt from antitrust scrutiny once it has been scrutinized under *Woelke* and the NLRA.

In addition, numerous Ninth Circuit district courts have held that once an exemption under the NLRA is established, as a matter of law there is no antitrust challenge. Judge Waters of this Court found a subcontracting limitation clause to be valid under the NLRA and *Woelke* and concluded.

> A contract that is validated by the National Labor Relations Act is not unlawful under the antitrust laws. *Suburban Tile Center v. Rockford Building Trades Council,* 354 F.2d 1, 3 (7th Cir. 1966), *cert. denied*, 384 U.S. 960 (1966).

Bunnell Construction Co. v. Carpenters, 115 LRRM 2525, 2528 (C.D.Cal. 1983) (Waters, J.). Judge Waters granted defendants' motion to dismiss, finding that as a result of the validity of the clause under the NLRA, plaintiff had failed to state an antitrust claim upon which relief could be granted.

In *Papazian v. Los Angeles Trades Council*, 83 LRRM 2710 (C.D.Cal. 1973) (Williams, J.), Judge Williams of this Court concluded first that a subcontracting provision was not violative of the NLRA. He then concluded:

> Plaintiff's second cause of action to the extent that it alleges a violation of either the state or federal antitrust laws is without merit. *Suburban Tile Center, Inc. v. Rockford Building and Construction Trades Council*, 354 F.2d 1, 3 (7th Cir. 1966),

Id. at 2712. *See also Dump Truck Owners v. General Contractors*, 70 LRMM 2412, 2413 (E.D.Cal. 1969) (Crocker, J.) ("Since Congress has seen fit to exempt the

construction industry from the provisions of [the labor laws], it follows that contracts made in accordance with the [NLRA] do not violate the antitrust laws").

Each of these opinions adopted the conclusion of the Seventh Circuit in *Suburban Tile Centers, Inc. v. Rockford Building and Construction Trades Counsil,* 354 F.2d 1, 3 (7th Cir. 1966), *cert. denied,* 394 U.S. 960, 86 S.Ct. 1585, *reh'g denied,* 385 U.S. 890, 87 S.Ct. 13 (1966), on this issue. In *Suburban,* the court held that once a party has established an exemption from the NLRA under the construction proviso of section 8(e), there cannot be antitrust liability. *Id.* The Court reasoned that if the defendant was successful in procuring the benefits accorded under section 8(e) of the NLRA, "it would be unreasonable to hold that . . . such an agreement constitutes a violation of the antitrust laws." *Id.*

In response to the authority cited by defendant, plaintiff argues that the Supreme court specifically rejected this argument in *United Mine Workers of America v. Pennington,* 38 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965). In *Pennington,* the defendant union took certain actions to protect the wages of its employees, namely, it entered into an agreement to foster mechanization so as to increase productivity. The agreement, mainly between larger producers and the union, required *all* coal companies to make contributions to the retirement fund. These contributions were required of the smaller producers, mechanized or not. The union also took other steps to exclude the marketing, production and sale of non-union coal. The union then sued one of the smaller companies for its share of the contributions. The company counterclaimed alleging that the agreement violated the antitrust laws. The Court considered the argument that the agreement was valid under the labor laws and found that it was

undisputed that a union could enter into an agreement to protect its employees' wages. The Court then concluded:

> This is not to say that an agreement resulting from union-employer negotiations is automatically exempt from Sherman antitrust scrutiny simply because the agreement involves a compulsory subject of bargaining.

381 U.S. at 664-65, 85 S.Ct. at 1590-91. The Court went on to analyze the agreement under common antitrust principles concluding that the agreement did violate the antitrust laws.

In *Local Union No. 180, Aamalgamated Meat Cutters v. Jewel Tea Co.,* 381 U.S. 676, 85 S.Ct. 1596, 14 L.Ed.2d 640 (1965), the Court considered whether an agreement restricting the number of hours meat cutters could be required to work violated the antitrust laws. The Court posed the issue before it as whether the agreement "falls within the protection of the national labor policy and is therefore exempt from the Sherman Act." *Id.* at 689, 82 S.Ct. at 1601. Thus, it appears that the Supreme court might have indicated that once a provision is exempt under the national labor laws, it "is therefore" exempt from Sherman Act liaiblity also. The Court then concluded that the agreement was covered under the NLRA and was exempt from antitrust liability.

The Supreme court's next, and latest, word on this issue came in *Connell Construction Company, Inc. v. Plumbers & Steam Local Union No. 100,* 421 U.S. 616, 95 S.Ct. 1830, 44 L.Ed.2d 418 (1975). In *Connell,* the Court found that the provision in question was such a blatant violation of the national labor laws, because it was not contained in a lawful collective bargaining agreement, that there was no possibility that it could be exempt from antitrust liability. The Court concluded:

> There can be no argument in this case, *whatever its force in other contexts,* that a restraint of this magnitude *might be entitled to an antitrust exemption if it were included in a lawful bargaining agreement.*

421 U.S. at 625-26, 95 S.Ct. at 1836-37 (emphasis added). The Ninth Circuit has commented on the amount of confusion this statement has caused courts in attempting to determine the proper relationship between the labor and antitrust laws. *See Brogan,* 682 F.2d 807.

After *Connell,* Judge Hufstedler of the Ninth Circuit wrote a concurring and dissenting opinion in *Ackerman-Chillingsworth v. Pacific Electrical Contractors Association,* 579 F.2d 484, 501-04 (9th Cir. 1978), *cert. denied,* 439 U.S. 1089, 99 S.Ct. 872, 59 L.Ed.2d 56 (1979) (Hufstedler, J., concurring and dissenting opinion). In *Ackerman,* Judge Hufstedler concluded that a labor exemption did not automatically exempt any given provision from antitrust scrutiny. Rather, Judge Hufstedler concluded, the Court must balance several factors. She said:

> Where an agreement has both a direct and substantial effect on competition among businessmen and an immediate and concrete effect on a mandatory subject of bargaining, the Court has first determined whether the agreement's anti-competitive effect is an incidental, derivative consequence of the effort to effectuate labor's legitimate objective or rather whether the anti-competitive effect is independent of the restriction directly necessary to serve labor's concerns. The application of this "least restrictive means" approach is illustrated in *Jewel Tea.*

Id. at 503.

In support of its motion, Sun-Land argues that there is no automatic exemption from antitrust liability merely because the provision is valid under the NLRA, citing

Pennington, Jewel Tea and Judge Hufstedler's opinion in *Ackerman.* Sun-Land argues that the Supreme Court's statement in *Connell* to the effect that there might be validity to the argument is mere *dicta.* Finally, Sun-Land distinguishes the *Suburban Tile Centers* case and the cases from this Court as "illegitimate progeny" inconsistent with the Supreme Court's holding in *Pennington.* The defendants respond that though the Ninth Circuit, *via* Judge Hufstedler, once indicated that a balanced least restrictive means test might be necessary in a case such as this, the Ninth Circuit has not continued to use such an analysis. In *Brogan,* the Ninth Circuit found that a clause almost identical to the one at issue here was valid under *Woelke* and the NLRA and reversed the lower court's granting of defendant's motion for summary judgment on the antitrust claims without any discussion other than the fact that *Woelke* validated the provision. The court did not engage in a balanced least restrictive means analysis.

This Court finds that defendants' arguments are more persuasive. Though the Supreme Court in *Pennington* did indicate that there was no automatic exemption from antitrust liability simply because the provision was legal under the national labor laws, the Court later recognized that the NLRA exemption might absolve the defendant from antitrust scrutiny if the agreement was valid under the NLRA. *See Connell,* 421 U.S. at 25-26, 95 s.Ct. at 1836-37. After the *Woelke* decision, the subcontracting limitation clause here is now valid under the NLRA. Moreover, the Ninth Circuit's decision in *Brogan* indicates that the Ninth Circuit now takes the position that once *Woelke* validates a clause, there is no antitrust violation. Finally, three judges in the Ninth Circuit have followed the Seventh Circuit's holding in *Suburban Tile Centers,* holding that an exemption under the NLRA shelters the provision from scrutiny under the antitrust laws.

As the court in *Suburban Tile* noted, it would be unreasonable for this Court to follow the Supreme Court's decision in *Woelke* and find that the provision limiting subcontracting to union employers is valid and then turn around and find that, nonetheless, its violative of the antitrust laws. 354 F.2d at 3.

Accordingly, defendant's motion for summary judgment on the sixth and seventh causes of action is granted and plaintiff's motion on the same causes is denied.

This Second Amended Memorandum of Decision and Order shall supercede the Memorandum of Decision and Order and Amended Memorandum of Decision and Order, each of which was heretofore filed and entered.

The Clerk shall send, by United States mail, a copy of this Memorandum of Decision and Order to counsel for the parties.

DATED: November 16, 1984.

ROBERT J. KELLEHER
Senior District Judge

APPENDIX E

ORDER

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUN-LAND NURSERIES, INC.
A California Corporation,
Plaintiff-Appellant,

v.

SOUTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS; AFFILIATED LABORERS LOCAL UNION 300; AFFILIATED LABORERS LOCAL UNION 652; and AFFILIATED LABORERS LOCAL UNION 1082,
Defendants-Appellees.

No. 85-6029

FILED: SEPTEMBER 17, 1986 Cathy A. Catterson, Clerk U.S. Court of Appeals

Before: BROWNING, Chief Judge, KENNEDY, FLETCHER, PREGERSON, ALARCON, CANBY, BOOCHEVER, NORRIS, REINHARDT, WIGGINGS and BRUNETTI, Circuit Judges.

Appellant's Petition for Rehearing by the Full Court having been distributed to all active judges of the court and no judge having requested a rehearing by the full court within fourteen days, it is hereby ordered that appellant's Petition for Rehearing by the Full Court is DENIED.

APPENDIX F

United States Code, Title 29:

§ 157

> "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment . . ."

§ 158(e)

> "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work . . ."

§ 158(f)

"It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by an action defined in section 8(a) or this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later . . . *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)."

United States Code, Title 15:

§ 1

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person one hundred thousand dollars, or by impris-

onment not exceeding three years, or both said punishments, in the discretion of the court.

§ 2

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On December 16, 1986, I served the within Petition for Writ of Certiorari in re: "Sun-Land Nurseries Inc. vs. Southern California District Council of Laborers" in the United States Supreme Court, October Term 1986, No. . . . . ;

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Julius Reich and Alexander B. Cvitan
Reich, Adell & Crost
501 Shatto Place, Suite 100
Los Angeles, California 90021
Attorney for Respondents

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on December 16, 1986, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA
(N)